

No. 11390

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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WILLAMETTE TUG AND BARGE COMPANY,  
a Corporation,

Appellant,

vs.

OLE ERICKSEN and PACIFIC BUILDING  
MATERIALS COMPANY, a Corporation, C.  
T. SMITH and ESSON SMITH, co-partners  
doing business as C. T. Smith and Son, Claim-  
ants of the Tug "CHARLES T", Steamship  
"KARL LIEBKNECHT",

Appellees.

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Apostles on Appeal

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Upon Appeal from the District Court of the United States  
for the District of Oregon

**FILED**

SEP 25 1946

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Ole Ericksen and Pacific Building  
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the Tug "Charles T".

For Appellees

In the United States Circuit Court of Appeals for  
the Ninth Circuit

No. 11390

OLE ERICKSEN and PACIFIC BUILDING  
MATERIALS COMPANY, a corporation,  
Libelants,

vs.

Diesel Tug "CHARLES T", C. T. SMITH and  
ESSON H. SMITH, co-partners doing busi-  
ness as C. T. SMITH & SON, Claimants of  
the Tug "CHARLES T",

Appellees,

WILLAMETTE TUG AND BARGE COMPANY,  
a corporation,

Appellant,

STEAMSHIP "KARL LIEBKNECHT".

### STATEMENT OF POINTS

The points on which appellant Willamette Tug and Barge Company, a corporation, intends to rely on this appeal are the same as stated in its Assignment of Errors which it hereby adopts with this exception:

#### I.

In finding and holding that the Barge EK-9 was damaged and made less valuable by the following items: Permanent Depreciation, \$1500.00; Supervision of Repairs by Ole Ericksen, \$700.00, being Assignment of Error No. 4 which this appellant

hereby waives and requests that it be not considered by this Court, and appellant hereby concedes that the United States District Court for the District of Oregon was correct in its original holding as to permanent depreciation and supervision of repairs.

/s/ L. A. RECKEN,

Proctor for Appellant Willamette  
Tug and Barge Company.

(Acknowledgement of Service.)

[Endorsed]: Filed August 7, 1946. Paul P.  
O'Brien, Clerk.

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In the District Court of the United States for the  
District of Oregon

No. Civil 2489

OLE ERICKSEN and PACIFIC BUILDING  
MATERIALS COMPANY, a corporation,  
Libelants,

vs.

Diesel Tug "CHARLES T",

Respondent

LIBEL IN ADMIRALTY

To the Honorable the Judges of the District Court  
of the United States, for the District of  
Oregon:

The libel of the Ole Ericksen, owner of the Barge  
EK-9, and Pacific Building Materials Company,  
charterer of said barge, against the diesel tug

Charles T, in a cause of towage, civil and maritime, alleges on information and belief as follows:

### I.

During the times herein named the libelant Pacific Building Materials Company was and is a corporation organized and existing under the laws of the State of Oregon.

### II.

During the times herein named the libelant Ole Ericksen was the owner and the libelant Pacific Building Materials Company was the charterer of that certain wooden cargo-carrying barge known as EK-9.

### III.

On or about June 2, 1944, at about 9:45 a.m., the said Barge EK-9, with two other barges, was in tow of the diesel tug Charles T. The crew of said tug consisted of two, namely, Charles Bates, master, and Lloyd Chappell, deckhand. Said tug at said time was proceeding down the Columbia River between Martins Bluff and Deer Island, about [1\*] opposite or a short distance below the green lighted buoy off Martins Bluff. At said time and place a certain steamship known as the Karl Liebkenecht was proceeding up the Columbia River. The said parties in charge of the tug Charles T then and there failed to keep and maintain a proper lookout and failed to see or observe the approach of the said steamship, and failed to keep their said tow of barges out of the way of said steamship As a

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

result of said fault on the part of the said two parties in charge of the navigation of the said Charles T, the said steamship collided with and damaged the said Barge EK-9.

#### IV.

Libelants do not yet have complete information as to the nature of the damage to the Barge EK-9 but allege on information and belief that the timbers of said barge were by the force of said collision broken, split and damaged to a great extent and that the reasonable cost of repairing said barge will be not less than the sum of \$9,000.00, and the loss of use of said barge during repairs will be not less than \$500.00.

#### V.

The said tug Charles T is now, or will be during the pendency of process hereunder, within the District of Oregon and within the jurisdiction of this Honorable Court.

#### VI.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelants pray as follows:

1. That process in due form of law, according to the practice of this Honorable Court in cases of admiralty [2] and maritime jurisdiction, may issue against the diesel tug Charles T, her engines, machinery, tackle, apparel, furniture, etc.

2. That all persons claiming any interest in said diesel tug Charles T, her engines, machinery, tackle,

apparel, furniture, etc., be required to appear and answer on oath all and singular the matters aforesaid.

3. That the libelants have a decree for the full amount of their damages with interest and costs.

4. That the diesel tug Charles T be condemned and sold to satisfy the damages of the libelants herein.

5. That this Honorable Court may grant to the libelants, and each and either of them, such other and further relief as to law and justice may appertain.

/s/ MacCORMAC SNOW,  
Proctor for Libelants.

United States of America,  
District of Oregon—ss.

I, Harry L. Rafferty, being first duly sworn, depose and say: I am secretary of Pacific Building Materials Company, one of the libelants above named; that I have read the foregoing libel and the same is true as I verily believe.

/s/ HARRY L. RAFFERTY.

Subscribed and sworn to before me this 8th day of June, 1944.

(Seal) /s/ DOROTHY FABER,  
Notary Public for Oregon.  
My Commission Expires: Jan. 20, 1946.

[Endorsed]: Filed June 9, 1944. [3]



[Title of District Court and Cause.]

CLAIM OF OWNER

To the Honorables, the Judges of the United States  
District Court for the District of Oregon:

Comes now Esson Smith, general partner and manager of C. T. Smith and Son, a partnership consisting of C. T. Smith and Esson Smith doing business as C. T. Smith and Son, and claims the Diesel Tug "Charles T" and says that the title to the said Diesel Tug "Charles T" was at the time of filing libel herein and still is in the name of C. T. Smith, but that the said partnership was then and now is the true owner of the said vessel, and prays leave to defend this suit accordingly.

This is a claim and not a general appearance.

/s/ ESSON SMITH.

/s/ THOMAS J. WHITE,

Proctor for Claimant.

State of Oregon,

County of Multnomah—ss.

I, Esson Smith, being first duly sworn, depose and say that I have read the foregoing Claim of Owner, know the contents thereof, and that the same is true as I verily believe; that I am a general partner and manager of the partnership of C. T. Smith and Esson Smith, doing business as C. T. [5] Smith and Son; and that I have authority to sign the said Claim of Owner on behalf of the said partnership.

/s/ ESSON H. SMITH.

Subscribed and Sworn to before me a Notary Public in and for the State of Oregon this 10th day of June, 1944.

(Seal)    /s/   THOMAS J. WHITE,  
Notary Public for Oregon.

My Commission expires July 29, 1946.

(Service admitted—approved as to forms.)

[Endorsed]:   Filed June 12, 1944. [6]

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[Title of District Court and Cause.]

STIPULATION TO ABIDE BY AND PAY THE  
DECREE AND FOR COSTS

Whereas a libel was filed in this Court on the 9th day of June, 1944, by Ole Ericksen and Pacific Building Materials Company, libelants, against the Diesel Tug "Charles T," in rem, for the causes and reasons in said libel mentioned, and praying that process issue against the said Diesel Tug "Charles T" and that the said Diesel Tug "Charles T" be condemned and sold to answer the prayer of said libelants; and

Whereas a warrant of arrest and monition to the United States Marshal to the Diesel Tug "Charles T" was issued by the Clerk of the Court on June 9, 1944, and

Whereas Esson Smith, a general partner of the partnership of C. T. Smith and Esson Smith, doing business as C. T. Smith and Son, has claimed the said Diesel Tug "Charles T" on behalf of her



owner, the said partnership, and prays leave to defend this suit accordingly; and

Whereas the General Casualty Company, a Washington corporation, a Surety Company authorized to do business in the State of Oregon, hereby consenting and agreeing that in case of default or contumacy on the part of the claimant, execution may issue against its goods, chattels and lands in the sum of Ten Thousand Dollars (\$10,000.00),

Now, Therefore, It Is Hereby Stipulated and Agreed for the benefit of whom it may concern, that the said General [7] Casualty Company is bound in the sum of Ten Thousand Dollars (\$10,000.00) conditioned that the claimant above named shall abide by and pay the money awarded in the final decree rendered in this cause, by this Court, or in case of appeal, by the Appellate Court, and conditioned further that the claimant above named shall pay any costs taxed against said claimant by the final decree rendered in this cause by this Court, or in case of appeal, by the Appellate Court.

GENERAL CASUALTY  
COMPANY.

[Seal] By /s/ E. J. DeVOE,  
Surety.

Dated this 12th day of June, 1944.

(Approved as to form.)

[Endorsed]: Filed June 12, 1944. [8]

[Title of District Court and Cause.]

PETITION TO BRING IN THE WILLAMETTE  
TUG AND BARGE COMPANY, AN ORE-  
GON CORPORATION, UNDER RULE 56,  
ADMIRALTY RULES OF PRACTICE

To: The Honorable James Alger Fee, and the Hon-  
orable Claude McCulloch, Judges of the Above-  
Entitled Court:

The Petition of C. T. Smith and Esson Smith, part-  
ners, doing business as C. T. Smith and Son,  
against Willamette Tug and Barge Company,  
an Oregon corporation, alleges on information  
and belief:

ARTICLE I.

That your petitioners, C. T. Smith and Esson  
Smith, are partners doing business as C. T. Smith  
and Son, having an office at Stevenson, Washing-  
ton, and an office at The Dalles, Oregon, and are  
the owners of the Diesel Tug "Charles T," the  
registered title to said vessel being in the name of  
C. T. Smith.

ARTICLE II.

At all time hereinafter mentioned the Willamette  
Tug and Barge Company was, and now is, a cor-  
poration duly organized and existing under and by  
virtue of the laws of the State of Oregon, having  
its principal office and place of business within  
the County of Multnomah, State of Oregon, District  
of Oregon, and within the jurisdiction of this  
Honorable Court.

## ARTICLE III.

That on the 9th day of June, 1944, a libel was filed in this court in the above-entitled cause against the said Diesel [29] Tug "Charles T" in rem by Ole Ericksen and Pacific Building Materials Company, a corporation, libelants in a cause of towage, civil and maritime, and the same is now pending, alleging, among other things, that on or about June 2, 1944, at about 9:45 p.m., a certain barge known as Barge EK-9, with two other barges, was in tow of the said Diesel Tug "Charles T"; that the crew of the said tug consisted of Charles Bates, Master, and Lloyd Chappell, deckhand; that said tug was proceeding down the Columbia River between Martin's Bluff and Deer Island, about opposite, or a short distance below the green lighted buoy off Martin's Bluff; that at said time and place the steamship "Karl Liebknecht" was proceeding up the Columbia River; that said parties in charge of the said tug "Charles T" then and there failed to keep a proper lookout and failed to see or observe the approach of the said steamship, and failed to keep the said tow of barges out of the way of the said steamship; and that as the result of the said alleged fault of the parties in charge of the navigation of the said "Charles T," the said steamship collided with and damaged the said Barge EK-9; and alleging further that the said libelants were damaged in a sum not less than \$9,500.00; and that the said libelants are represented in this cause by McCormac Snow, Pacific Building, Portland, Oregon.

## ARTICLE IV.

That on or about the 5th day of April, 1944, your petitioners entered into an oral contract with the said Willamette Tug and Barge Company whereby for and in consideration of an agreed rental to be paid by the said Willamette Tug and Barge Company to your petitioners, your petitioners did charter, transfer and deliver to the said Willamette Tug and Barge Company the entire custody, possession, management and control of the said Diesel Tug "Charles T," including the entire command and control [30] over the navigation of the said tug, and that the said tug was being so operated by the said Willamette Tug and Barge Company under the provisions of the said charter at the time and place of the collision alleged in the libel hereinbefore referred to in Article III hereof.

## ARTICLE V.

That on or about the 12th day of June, 1944, there was filed in this court by your petitioners, a Claim of Owner wherein it was alleged, among other things, that title to the said Diesel Tug "Charles T" was at that time, and was at the time of filing said libel in the name of C. T. Smith, but that the said partnership hereinbefore alleged in Article I hereof was the true owner of said tug; and leave of this Honorable Court was prayed to defend said claim.

## ARTICLE VI.

That thereafter and heretofore, your petitioners filed in this Honorable Court an answer to the said

libel and in said answer alleged on information and belief, among other things, that the said collision and the consequent damage as may have been sustained by the Barge EK-9 were not caused or contributed to by any fault or negligence on the part of the said Diesel Tug "Charles T," or those in charge of her, but were caused solely by the fault and negligence of the said S. S. Karl Leibknecht, her owners, operators and those in charge of her in the following respects, among others:

1. She failed to keep a good lookout;
2. She failed to keep to her own starboard side of the channel;
3. She failed to sound passing or warning signals;
4. She failed to slow, stop or reverse her engines when danger of collision was or should have been apparent;
5. After danger of collision was, or should have been apparent, she failed to take proper precautions to avoid collision; [31]
6. She failed to alter her course to her starboard.

#### ARTICLE VII.

That on the 30th day of June, 1944, this Honorable Court, by an order duly made and entered in the above-entitled cause, granted to your petitioners leave to file their Petition, under Rule 56 of the Supreme Court, impleading the said vessel Karl Leibknecht, as a respondent, in this Court, and



that heretofore process in due form of law has issued against said S. S. Karl Leibknecht, her engine, machinery, tackle, furniture, etc., and that heretofore the owners of the said Karl Leibknecht have filed in this cause a claim of Owner and a Stipulation to abide by and pay the Decree, including costs, in the sum of \$15,000.00.

### ARTICLE VIII.

That heretofore, this Honorable Court made and entered its Order in the above-entitled cause, based upon the stipulation of the said libelants, and your petitioners, as claimants, which Order, eliminating its formal parts, is as follows:

“Now, Therefore, It Is Ordered that the claimants shall present to the court a bond for the sum of \$15,000, in due form of law, with sufficient surety to answer the exigencies of this cause, and upon the approval and filing of said \$15,000 bond, the said \$10,000 bond may be deemed canceled, held for naught and withdrawn from the files of this cause, and thereafter the said \$15,000 bond shall be in full force and effect for all purposes provided by the conditions of said bond and by law.

/s/ JAMES ALGER FEE,  
Judge.

Dated this 11th day of July, 1944.”

That pursuant to said Order your petitioners, as claimants, presented to this Honorable Court the said bond in the sum of \$15,000.00, which bond was approved and filed herein.

## ARTICLE IX.

That if the said Diesel Tug "Charles T," and your petitioners as owners and claimants of the said tug, are under [32] any liability by reason of any of the matters alleged in the said libel of the libelants, Ole Ericksen and Pacific Building Materials Company, a corporation, which liability your petitioners have heretofore denied, on information and belief, in their said Answer to the said Libel and in their Petition to bring in the said vessel S. S. Karl Leibknecht, and which liability your petitioners hereby deny on information and belief, then any and all such liability was caused by the fault or negligence of the said Willamette Tug and Barge Co., the said charterer and operator of the tug "Charles T" at the time and place of the collision set forth in libellant's libel, as heretofore alleged, and not by any fault or negligence of your petitioners, by reason whereof any and all said liability, if any, should be borne by the said Willamette Tug and Barge Company, and not by your petitioners; and that by reason of the premises the said Willamette Tug and Barge Company should be proceeded against directly in this Court in this suit.

## ARTICLE X.

That your petitioners, as claimants and owners of the said Diesel Tug "Charles T" have heretofore incurred costs, disbursements and proctors' fees in defending the said libel, and will expend further sums for said purposes, which sums should be borne by the said Willamette Tug and Barge Com-

pany, the respondent herein, and not by your petitioners, and that the reasonable amounts expended and to be expended for the said purposes will not be less than Twelve hundred fifty (\$1250.00) Dollars.

#### ARTICLE XI.

That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, your petitioners pray that a citation in due form of law may issue against the said Willamette Tug and Barge Company, a corporation, the respondents herein, citing it to [33] appear and answer all and singular the matters and things in this petition and libel herein set forth, and that the respondent may be proceeded against as if originally made a party hereinto the amount sued for in the libel herein, and if this Honorable Court should find that the libelants are entitled to a decree, than that said decree be entered against the respondent herein, the Willamette Tug and Barge Company, a corporation; that your petitioners be awarded their costs, disbursements and proctors' fees incurred herein; and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem just.

/s/ THOMAS J. WHITE,

/s/ SAMUEL H. BEAR,

Proctors for the Petitioners.



State of Oregon,  
County of Multnomah—ss.

I, Esson Smith, being first duly sworn, depose and say: that I am a general partner and manager of the partnership of C. T. Smith and Esson Smith, doing business as C. T. Smith and Son; that I have read the foregoing petition, know the contents thereof, and the same is true to the best of my knowledge, except as to matters therein alleged on information and belief, and as to those matters, I believe it to be true.

/s/ ESSON H. SMITH.

Subscribed and sworn to before me this 24th day of July, 1944.

[Seal]      /s/ ROBERT A. LEEDY,  
Notary Public for Oregon.

My notarial commission expires on Oct. 15, 1945.

United States of America,  
District and State of Oregon,  
County of Multnomah—ss.

Due service of the within Petition to bring in the Willamette Tug and Barge Company, etc., is hereby accepted in Multnomah County, Oregon, this 2nd day of August, 1944, by receiving a copy thereof, duly certified to as such by Thomas J. White, of Attorneys for C. T. Smith and Esson Smith, doing business as C. T. Smith and Son.

/s/ MacCORMAC SNOW,  
Proctor for Libelants.

/s/ ERSKINE WOOD,  
Proctor for Claimant of the  
Karl Liebekneckt.

[Endorsed]: Filed Aug. 4, 1944. [35]

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[Title of District Court and Cause.]

ANSWER OF C. T. SMITH AND ESSON  
SMITH, PARTNERS, DOING BUSINESS  
AS C. T. SMITH AND SON, TO AMENDED  
LIBEL, AS CLAIMANTS OF THE TUG  
“CHARLES T”

To: The Honorables, the Judges of the District  
Court of the United States for the District of  
Oregon:

The Answer of C. T. Smith and Esson Smith,  
partners doing business as C. T. Smith and Son,

claimants of the diesel tug "Charles T," as the same is proceeded against in rem upon the amended libel of Ole Ericksen and Pacific Building Materials Company, in a cause of towage, civil and maritime (filed on leave of court), alleges as follows:

I.

Claimants admit the allegations of Article I of the Amended Libel.

II.

Claimants deny any knowledge or information sufficient to form a belief of the allegations of Article II of the Amended Libel and call for proof thereof.

III.

Claimants admit that on or about June 2, 1944, at about 10:45 p.m., the Barge EK-9, with two other barges, was in tow of the Diesel Tug "Charles T"; that the crew of the said tug consisted of Charles Bates, Master, and Lloyd Chappell, deckhand; that at said time said tug was proceeding down the Columbia River, between Martin's Bluff and Deer [61] Island, opposite or a short distance below the green lighted buoy off said Martin's Bluff; that at said time and place a certain steamship known as the "Karl Liebknecht" (herein in the files of this cause sometimes spelled "Karl Leibkenecht") was proceeding up the Columbia River; and that the said steamship collided with and caused some damage, the extent of which damage is unknown to claimants, to the said Barge EK-9. Fur-

ther answering, claimants, on information and belief, deny the other allegations of Article III of the Amended Libel.

#### IV.

Claimants deny any knowledge or information sufficient to form a belief as to the allegations of Article IV of the Amended Libel, and therefore call for strict proof of the same.

#### V.

Claimants admit the allegations of Article V of the Amended Libel.

#### VI.

Claimants admit the allegations of Article VI of the amended libel.

#### VII.

Claimants admit the allegations of Article VII of the Amended Libel.

#### VIII.

Claimants admit the admiralty and maritime jurisdiction of the United States and of this Honorable Court and deny the other allegations of Article VIII of the Amended Libel.

#### IX.

Further answering the said amended libel, and as a [62] further and separate defense thereto, claimants, on information and belief, allege the true facts are as follows:

On or about the second day of June, 1944, at about 10:45 p.m. the Diesel Tug "Charles T," with

its crew consisting of Charles Bates, Master, and Lloyd Chappell, deckhand, had in tow the Barge EK-9 and two other barges. The said tug was at said time proceeding with the said tow down the Columbia River on her own starboard side of the channel, between Martin's Bluff and Deer Island, about opposite, or just below, the green lighted buoy off Martin's Bluff. At said time and place, the towing and all running lights of the said tug "Charles T," were lighted and the running lights on the said barges were lighted. While so proceeding, a vessel, which proved to be the "Karl Liebknecht," was observed proceeding up the Columbia River, whereupon the said tug "Charles T," keeping to her own starboard side of the channel, changed her course so as to approach closer to the (her) starboard bank of the river. The said vessel, "Karl Liebknecht," instead of keeping and pulling to her own starboard side of the channel, proceeded on a course so that her stem struck the Barge EK-9 a glancing blow amidships. The stem of the said vessel became locked with the said Barge and so remained until the engines of the said vessel were reversed and she backed down-river so as to clear the said Barge. The said Barge EK-9, and the other two barges of the said tow, carried by current of the river, then passed the said vessel starboard to starboard, the towline by which they had been towed having been broken during the accident. The said tug "Charles T" and the said vessel "Karl Liebknecht" passed port to port. [63]

## X.

That said collision and consequent damage as may have been sustained by the said Barge EK-9 were not caused or contributed to by any fault or neglect on the part of the said Diesel Tug "Charles T" or those in charge of her, but were caused solely by the fault and negligence of the said SS "Karl Liebkencht," her owners, operators and those in charge of her, in the following respects, among others:

1. She failed to keep a good lookout.
2. She failed to keep to her own starboard side of the channel.
3. She failed to sound passing or warning signals.
4. She failed to slow, stop, or reverse her engines when danger of collision was or should have been apparent.
5. After danger of collision was or should have been apparent she failed to take proper precautions to avoid collision.
6. She failed to alter her course to her starboard.



XI.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, claimants pray this Honorable Court that the Amended Libel herein be dismissed, with costs.

/s/ TH. J. WHITE,

/s/ SAMUEL H. BEAR,

Proctors for Claimants of the  
"Charles T."

State of Oregon,  
County of Multnomah—ss.

I, Esson Smith, being first duly sworn, depose and say: that I am a general partner and Manager of the partnership of C. T. Smith and Esson Smith, doing business as C. T. Smith and Son, Claimants of the Diesel tug "Charles T"; that I have read the foregoing Answer to the Amended Libel, know the contents thereof, that the same is true to the best of my knowledge, except as to matters therein alleged on information and belief, and as to those matters, I believe it to be true.

/s/ ESSON H. SMITH.

Subscribed and sworn to before me this 26 day of September, 1944.

[Seal] /s/ A. M. MAPLE,

Notary Public for Oregon.

My notarial commission expires on 2/6/45.

State of Oregon,  
County of Multnomah—ss.

Service of the within Answer to Amended Libel, by certified copy, at Portland, Oregon, this 27th day of September, 1944, is hereby admitted.

/s/MacCORMAC SNOW,  
Of Proctors for Libelants.

/s/ ERSKINE WOOD,  
Proctor for Respondent, SS  
Karl Lieb knecht.

/s/ SENN & RECKEN,  
Of Proctors for Respondent,  
Willamette Tug and Barge  
Company.

[Endorsed]: Filed Sept. 27, 1944. [65]

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[Title of District Court and Cause.]

ANSWER OF WILLAMETTE TUG AND  
BARGE COMPANY, A CORPORATION,  
TO THE AMENDED LIBEL OF OLE  
ERICKSEN AND PACIFIC BUILDING  
MATERIALS COMPANY, A CORPORA-  
TION

To: The Honorable the Judges of the District Court  
of the United States for the District of Oregon:

The answer of Willamette Tug and Barge Com-  
pany, a corporation, Respondent, to the amended  
libel of Ole Ericksen and Pacific Building Materials  
Company alleges as follows and says:



## ARTICLE I.

Respondent admits Article I of the amended libel.

## ARTICLE II.

Respondent denies any knowledge or information sufficient to form a belief of the allegations of Article II of the amended libel and calls for proof thereof.

## ARTICLE III.

Respondent admits that on or about the 2nd day of June, 1944, at about 9:45 p.m. the said Barge "EK-9," with two other barges, was in tow of the diesel tug "Charles T." [66] That the crew of said tug consisted of Charles Bates, master, and Lloyd Chappell, deckhand. That at said time and place said tug was proceeding down the Columbia River between Martin's Bluff and Deer Island opposite or a short distance below the green lighted buoy off Martin's Bluff. That at said time and place a certain steamship known as "Karl Liebkecht" (herein in the files of this cause sometimes spelled "Karl Leibkenecht") was proceeding up the Columbia River and that said steamship collided with and caused some damage to the Barge "EK-9." Further answering respondent denies the other allegations of said Article III.

## ARTICLE IV.

Respondent denies any knowledge or information sufficient to form a belief of the allegations of Article IV of said amended libel and, therefore, calls for strict proof of the same.

## ARTICLE V.

Respondent admits Article V of said amended libel.

## ARTICLE VI.

Respondent admits Article VI of said amended libel.

## ARTICLE VII.

Respondent admits Article VII of said amended libel.

## ARTICLE VIII.

Respondent denies the allegations of Article VIII of said amended libel and denies all of the allegations of said amended libel, except wherein same are admitted and respondent, Willamette Tug and Barge Company, a corporation, does hereby require proof as to the truth of the allegations and articles set forth in said amended libel. [67]

Wherefore respondent, Willamette Tug and Barge Company, a corporation, prays that said amended libel may be dismissed with costs and that respondent may have such other, further and different relief as may be just and in accordance with the admiralty practice.

/s/ SENN & RECKEN.

GRIFFITH, PECK, PHILLIPS  
AND NELSON.

SENN & RECKEN,

Proctors for Respondent, Willamette Tug and  
Barge Company, a Corporation.

Service accepted this 5th day of October, 1944, by receipt of a duly certified copy thereof, as required by law.

/s/ WHITE & BEAR,

Proctors for Diesel Tug "Charles T" and C. T. Smith and Esson Smith.

/s/ ERSKINE WOOD,

Of Proctors for Steamship  
"Karl Liebknecht."

State of Oregon,  
County of Multnomah—ss.

I, Clarence D. Phillips, being first duly sworn, say that I am the Secretary of Willamette Tug and Barge Company, a corporation, Respondent in the within entitled action and that the foregoing Answer to amended libel is true as I verily believe.

/s/ CLARENCE D. PHILLIPS.

Subscribed and sworn to before me this 5th day of October, 1944.

[Seal] /s/ L. A. RECKEN,

Notary Public for Oregon.

My Commission Expires Jan. 15, 1945. [68]

State of Oregon,  
County of Multnomah—ss.

Due service of the within Answer to Amended Libel is hereby accepted in Multnomah County, Oregon, this 5th day of October, 1944, by receiving a copy thereof, duly certified to as such by L. A. Recken, of Attorneys for Respondent.

/s/ MacCORMAC SNOW,

K

Attorney for Libelants.

[Endorsed]: Filed Oct. 5, 1944. [69]

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[Title of District Court and Cause.]

### STIPULATION

It Is Hereby Stipulated with respect to the second amended libel served and tendered for filing by the libelants, as follows:

1. All parties consent to the filing of said second amended libel.

2. C. T. Smith and Esson Smith, co-partners doing business as C. T. Smith and Son, as claimants of the tug "Charles T", and Willamette Tug and Barge Company, respondent, deny each and all of the allegations of negligence set forth in said second amended libel against said tug and its operators.

3. The Government Purchasing Commission of

the Soviet Union in the U. S. A., as claimant of the steamship "Karl Liebknecht", admits the said allegations of negligence charged in said second amended libel against the tug "Charles T".

/s/ MacCORMAC SNOW,

/s/ GUNTHER F. KRAUSE,

Proctors for Libelants. [70]

/s/ THOMAS J. WHITE,

/s/ SAMUEL H. BEAR,

Proctors for C. T. Smith and Esson Smith, co-partners doing business as C. T. Smith and Son.

/s/ L. A. RECKEN,

of Proctors for Respondent.

/s/ ERSKINE WOOD,

/s/ LOFTON L. TATUM,

Proctors for The Government Purchasing Commission of the Soviet Union in the U. S. A.

[Endorsed]: Filed Feb. 2, 1945.

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[Title of District Court and Cause.]

## SECOND AMENDED LIBEL

To the Honorable, the Judges of the District Court of the United States, for the District of Oregon:

The second amended libel of Ole Ericksen, owner of the Barge EK-9, and Pacific Building Materials Company, charterer of said barge, against the diesel tug "Charles T", in a cause of towage, civil and

maritime, filed on leave of court, alleges on information and belief as follows:

### I.

During the times herein named the libelant Pacific Building Materials Company was and is a corporation organized and existing under the laws of the State of Oregon.

### II.

During the times herein named the libelant Ole Ericksen was the owner and the libelant Pacific Building Materials Company was the charterer of that certain wooden cargo-carrying barge known as "EK-9". [71]

### III.

On or about June 2, 1944, at about 9:45 P. M., the said Barge "EK-9", with two other barges, was in tow of the diesel tug "Charles T". The crew of said tug consisted of two, namely, Charles Bates, master, and Lloyd Chappell, deckhand. Said tug at said time was proceeding down the Columbia River between Martins Bluff and Deer Island, about opposite or a short distance below the green lighted buoy off Martins Bluff. At said time and place a certain steamship known as the "Karl Liebknecht" (herein in the files of this cause sometimes spelled "Karl Liebkeneckt") was proceeding up the Columbia River. The said parties in charge of the tug "Charles T" then and there failed to keep and maintain a proper lookout and failed to see or observe the approach of the said steamship, and failed to keep their said tow of barges out of the way of



said steamship. The said tug and her navigation, throughout all said maneuvers, was, as libelants are informed and believe and therefore say, in charge of an inexperienced deckhand who knew nothing about navigation or the channel or the beacons or river conditions, and as the vessels approached each other lost his head and did not know what to do. The master of said tug, so the libelants are informed and believe and therefore allege, was, during all the time until the collision was imminent, asleep, and the said collision was caused at least in part by the fault of the said deckhand in cutting across the bow of the "Karl Liebknecht" without blowing a passing whistle or without giving any warning whatever of what he was going to do. As a result of said faults on the part of the said [72] two parties in charge of the navigation of the said "Charles T", the said steamship collided with and damaged the said Barge "EK-9".

#### IV.

Libelants do not yet have complete information as to the nature of the damage to the Barge "EK-9" but allege on information and belief that the timbers of said barge were by the force of said collision broken, split and damaged to a great extent and that the reasonable cost of repairing said barge will be not less than the sum of \$15,000.00.

#### V.

The said tug "Charles T" was during the pendency of process hereunder within the District of

Oregon and within the jurisdiction of this Honorable Court. Since the filing of said libel the owners of the "Charles T" have filed their claim to the said tug and have filed a stipulation in the sum of \$15,000.00 to answer the exigencies of the said libel and of this second amended libel.

## VI.

Since the filing of said libel the claimants C. T. Smith and Esson Smith, co-partners doing business as C. T. Smith and Son, owners of said diesel tug "Charles T", filed a petition under the 56th Admiralty Rule for the arrest of the steamship "Karl Liebknecht", and thereafter the owners of said steamship filed a claim to said vessel and a stipulation in the sum of \$15,000.00 to answer the exigencies of the libel herein and of this second amended libel. The libelants have filed and will file and answer to said petition in respect to the steamship "Karl Liebknecht". These libelants repeat and incorporate herein the admissions, denials and allegations [73] of the said answer and make the same a part of this second amended libel.

## VII.

The said C. T. Smith and Esson Smith, co-partners doing business as C. T. Smith and Son, owners of the diesel tug "Charles T", also have filed a petition herein under the 56th Admiralty Rule to bring in and make a party respondent to this cause the Willamette Tug and Barge Company, a corporation. Libelants have filed and will file an answer to



the said petition. Libelants now repeat and incorporate herein the admissions, denials and allegations of their said answer to the said petition respecting Willamette Tug and Barge Company, and make the same a part of this second amended libel.

### VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelants pray as follows:

1. That the diesel tug "Charles T", its bondsman and stipulator, be held to answer for the full amount of damages suffered by the libelants and each of them as a result of the collision alleged in this second amended libel, together with interest thereon and costs;

2. That the impleaded steamship "Karl Liebknecht", her bondsmen and stipulators, be held to answer for the full amount of damages suffered by the libelants as a result of the collision alleged in this second amended libel;

3. That the judgment to be awarded libelants and each of them against the diesel tug "Charles T", her bondsman and stipulator, shall be in no respect stayed or minimized through the operation of the [74] the judgment to be awarded the libelants and each of them against the steamship "Karl Liebknecht", her bondsmen and stipulators.

4. That in the event this Honorable Court shall award the libelants and each or either of them a sec-

ondary judgment against the Willamette Tug and Barge Company by reason of the matters and things set forth in the aforesaid petition against the Willamette Tug and Barge Company, and the answer of the libelants thereto, any such judgment shall not have the effect of staying or minimizing the judgment to be awarded the libelants and each of them against the diesel tug "Charles T", its bondsman and stipulator.

5. Libelants further pray for such other and further relief as may be just and equitable.

(Seal)    /s/   MacCORMAC SNOW,  
             /s/   GUNTHER F. KRAUSE,  
                         Proctors for Libelants.

United States of America,  
District of Oregon—ss.

I, Ole Ericksen, being first duly sworn, depose and say that I am one of the libelants herein, and that the foregoing second amended libel is true as I verily believe.

/s/ OLE ERICKEN.

Subscribed and sworn to before me this 29th day of January, 1945.

(Seal)               /s/ MacCORMAC SNOW,  
Notary Public for Oregon.

My Commission expires: Sept. 28, 1948.

Service of the within second amended libel is hereby admitted this 29th day of January, 1945.

/s/ SAMUEL H. BEAR,

Of Proctors for C. T. Smith and Esson Smith, Co-partners Doing Business as C. T. Smith and Son.

/s/ LOFTON L. TATUM,

Of Proctors for the Steamship "Karl Liebknecht", her Claimants and Stipulators.

/s/ SENN & RECKEN BY BS,

Proctors for Respondent Willamette Tug and Barge Company.

[Endorsed]: Filed in open court Jan. 29, 1945.

[Title of District Court and Cause.]

PRE-TRIAL ORDER  
ADMITTED FACTS

1. During the times named herein, Pacific Building Materials Company and Willamette Tug and Barge Company were and are Oregon corporations, and C. T. Smith and Esson Smith were co-partners doing business as "C. T. Smith and Son". The said corporations are sometimes hereinafter referred to as the "Pacific" and "Willamette" Companies, respectively, and the said partnership under its partnership name. During the times named herein, The Government Purchasing Commission of the Soviet Union in the U. S. A., sometimes hereinafter referred to as the "Purchasing Commission", was and is an agency of the United Soviet Socialist Republics, a sovereign, and is entitled to the sole possession of the steamship "Karl Liebknecht".

2. During the times named herein, C. T. Smith and Son were and are owners of the diesel tug "Charles T", and the Purchasing Commission was and [76] is the claimant of the steamship "Karl Liebknecht".

3. On or about June 2, 1944, at about 9:45 P. M., or 10:45 P. M., the Barge "EK-9" with two other barges was in tow of the diesel tug "Charles T" and the flotilla was proceeding down the Columbia River in the vicinity of Martins Bluff and Deer Island. At said time and place the steamship "Karl Liebknecht" was proceeding up the Columbia River and a collision occurred between the steamship "Karl

Liebknrecht" and the Barge "EK-9". As a result of said collision the libelants claim that said barge was damaged.

### ALIGNMENT OF THE PARTIES

4. On or about June 9, 1944, libelants filed their libel against the said tug "Charles T", in rem, charging that said collision occurred through the negligence of the operators of said tug, and that said Barge "EK-9" was damaged in the amount of \$10,000.00. With said libel libelants filed their stipulation for costs, in due form of law, in the amount of \$250.00, with General Casualty Company as surety. On or about August 22, 1944, libelants filed an amended libel claiming damages in the amount of \$15,000.00 to said barge.

5. On or about June 14, 1944, C. T. Smith and Son filed their claim to the tug "Charles T", in due form of law, and prayed to defend this suit. Thereafter, by stipulation and agreement of the said two parties, C. T. Smith and Son filed their bond, in due form of law, to abide by and pay the decree, and for costs, in the sum of \$15,000.00, with General Casualty Company as surety thereon. On or about June 16, 1944, C. T. Smith and Son, [77] as claimant of the tug "Charles T", filed their answer to said libel denying the charges of negligence against said tug. By stipulation the said denials are made to extend to each and all of the charges of negligence against said tug and its operators set forth in the said second amended libel.

6. On or about June 14, 1944, C. T. Smith and Son filed their petition to bring into this cause the steamship "Karl Lieb knecht", and therein charged that the collision occurred through the negligence of the operators of the said steamship, in the particulars alleged in said petition. With the said petition C. T. Smith and Son filed their stipulation for costs, in due form of law, with General Casualty Company as surety. This court by order of June 30, 1944, allowed said petition. The clerk thereupon issued a warrant of arrest against the steamship "Karl Lieb knecht", and the Purchasing Commission on or about June 30, 1944, filed its claim in due form of law to said steamship and its bond to abide by and pay such decree as might be awarded against it, together with costs, in the sum of \$15,000.00, with United States Fidelity & Guaranty Company as surety.

7. On or about August 4, 1944, C. T. Smith and Son filed their petition against the Willamette Company charging that because of certain contractual arrangements between said two parties, the Willamette Company was liable for the damage caused to the Barge "EK-9", if such damage was caused by any negligence on the part of the tug "Charles T", and praying that if libelants are entitled to a decree, that decree should be awarded against the Willamette Company, and that C. T. Smith and Son be awarded their costs, disbursements proctor's [78] fees and other relief. With said petition C. T.



Smith and Son filed their stipulation for costs, in due form of law, with General Casualty Company as surety. This court on August 4, 1944, made an order directing that citation issue against the Willamette Company. Such citation issued and the Marshal duly served the Willamette Company with the same.

8. On August 22, 1944, the libelants answered the petition of C. T. Smith and Son to bring in the "Karl Liebknecht" by admitting the allegations of negligence against the "Karl Liebknecht" set forth therein, and thereupon prayed that if this court should find the "Karl Liebknecht" negligent in any of the particulars alleged, it should award libelants judgment against the bondsman of the "Karl Liebknecht" as well as against the bondsman of the tug "Charles T". On August 22, 1944, libelants answered the petition of C. T. Smith and Son against the Willamette Tug and Barge Company by denying knowledge and information concerning the details of the contractual arrangements between C. T. Smith and Son and the Willamette Company and praying that in the event this court should award them a secondary judgment against the Willamette Company by reason of the matters and things set forth in said petition, any such judgment should not have the effect of minimizing or staying the responsibility of the tug "Charles T" or its bondsman on account of the damage to said barge.

9. On or about September 2, 1944, the Willamette Company filed its answer to the petition of C.



T. Smith and Son denying responsibility for [79] the acts of those on board the tug "Charles T", and denying liability for any damage sustained by Barge "EK-9".

10. The Purchasing Commission filed its answer to the petition of C. T. Smith and Son, denying the charges of negligence made in said petition against the steamship "Karl Liebknecht" and asserting negligence on the part of the operators of the tug "Charles T" in the particulars alleged in said answer.

11. On February 2, 1945, libelants filed a second amended libel in which, in addition to the charges of negligence which libelants set forth against the tug "Charles T" in their libel and amended libel, libelants charged negligence against said tug in the same language as the Purchasing Commission used in its answer to the petition of C. T. Smith and Son against the "Karl Liebknecht".

## ALLEGATIONS AND CONTENTIONS OF LIBELANTS

12. Libelants allege and contend that Ole Erickson and the Pacific Company were, respectively, the owner and charterer of the Barge "EK-9", and were and are jointly and severally interested in any recovery which may be made herein by reason of the damage to said barge. C. T. Smith and Son, the Willamette Company and the Purchasing Commission deny this allegation and put libelants to the proof thereof.

13. The libelants have alleged and do now allege and contend that the collision was proximately caused and contributed to by the following acts of negligence on the part of those in charge of the navigation of the tug "Charles T" and those in charge of the navigation of the "Karl Liebknecht", namely:

14. At and before the time and place of the collision, those in charge of the navigation of the tug "Charles T" failed to keep and maintain a proper lookout [80] and failed to see or observe the approach of the steamship "Karl Liebknecht", and failed to keep their said tow of barges out of the way of said steamship. The said tug and her navigation, throughout all said maneuvers, was, as libelants are informed and believe and therefore say, in charge of an inexperienced deckhand who knew nothing about navigation or the channel or the beacons or river conditions, and as the vessels approached each other lost his head and did not know what to do. The master of said tug, so the libelants are informed and believe and therefore allege, was, during all the time until the collision was imminent, asleep, and the said collision was caused at least in part by the fault of the said deckhand in cutting across the bow of the "Karl Liebknecht" without blowing a passing whistle or without giving any warning whatever of what he was going to do. As a result of said faults on the part of the said two parties in charge of the navigation of the said

"Charles T", the said steamship collided with and damaged the said Barge "EK-9".

15. The parties in charge of the navigation of the "Karl Liebknecht" at and before the time and place of the collision were negligent in the following respects, among others:

(1) She failed to keep a good lookout.

(2) She failed to keep to her own starboard side of the channel.

(3) She failed to sound passing or warning signals.

(4) She failed to slow, stop, or reverse her engines when danger of collision was or should have been apparent.

(5) After danger of collision was or should have been apparent she failed to take proper precautions to avoid collision.

(6) She failed to alter her course to her starboard. [81]

16. As a result of said collision the Barge "EK-9" was damaged and made less valuable by the following items:

Cost to towage .....	\$ 38.00
Cost of repairs .....	8,877.10
Permanent depreciation .....	5,000.00
Supervision of repairs by	
Ole Ericksen .....	700.00
Interest on the above amounts from	
date of collision, June 2, 1944.	

Allegations and Contentions of C. T. Smith and Son,  
the Purchasing Commission and the Willamette  
Company

17. C. T. Smith and Son deny the allegations and contentions set forth in paragraphs 14 and 16 of this pre-trial order but admit those of paragraph 15 hereof. C. T. Smith and Son deny that the operators of the tug "Charles T" were guilty of any fault causing or contributing to the collision but contend that the collision was caused solely by the faults of the operators of the "Karl Liebknecht", as set forth in paragraph 15 hereof. As to the damage to the Barge "EK-9" caused by said collision, C. T. Smith and Son put libelants to the proof thereof.

18. The Purchasing Commission denies the allegations and contentions set forth in paragraphs 15 and 16 of this pre-trial order but admits those of paragraph 14 hereof. The Purchasing Commission denies that the operators of the "Karl Liebknecht" were guilty of any fault causing or contributing to the collision but contend that the collision was caused solely by the faults of the operators of the "Charles T", as set forth in paragraph 14 hereof. As to the damage to the Barge "EK-9" caused by said collision, the Purchasing Commission puts libelants to the proof thereof. [82]

19. The Willamette Company denies the allegations and contentions set forth in paragraphs 14 and 16 of this pre-trial order but admits those of paragraph 15 hereof. The Willamette Company

denies that the operators of the tug "Charles T" were guilty of any fault causing or contributing to the collision, but contend that the collision was caused solely by the faults of the operators of the "Karl Liebknecht", as set forth in paragraph 15 hereof. As to the damage to the Barge "EK-9" caused by said collision, the Willamette Company puts libelants to the proof thereof.

20. As between C. T. Smith and Son and the Willamette Company, C. T. Smith and Son charge that at and before the time and place of the collision they did charter, transfer and deliver to the Willamette Company the entire custody, management and control of the "Charles T", including the entire command and control over its management; that the Willamette Company was the operator of the tug "Charles T"; and that the master and deckhand of said tug, to-wit, Charles Bates and Lloyd Chappell, respectively, were at said time and place servants and agents of the Willamette Company and not of C. T. Smith and Son. The Willamette Company on the other hand contends that at and before the time and place of the collision the said master and deckhand of the tug "Charles T" were agents and servants of C. T. Smith and Son and not of the Willamette Company. The Willamette Company further contends that the contract between C. T. Smith and Son and the Willamette Company under which the said tug was operating at and before the time and place of the collision was an ordinary contract of towage wherein the tug and its owners assumed the usual duties and obligations of the tower in such towage contract. [83]



21. Both C. T. Smith and Son and the Willamette Company concede that if the court should hold that the collision and damage to the Barge "EK-9" were caused or contributed to by faults on the part of the operators of the tug "Charles T", the judgment of this court should go against the bondsman of the tug "Charles T" to the extent the court determines.

22. In the event that the court should hold that the collision was caused or contributed to by any fault or faults on the part of the operators of the tug "Charles T" and should thereby enter a judgment against the General Casualty Company under said bond for damages to the Barge "EK-9", C. T. Smith and Son contend and claim that the Willamette Company should be required by the decree of the court to hold them harmless and to indemnify them in respect to their duty and obligation to indemnify the General Casualty Company. The Willamette Company denies that it is under any duty or obligation to indemnify C. T. Smith and Son as above recited, and denies that the decree of this court should impose upon it any such requirement.

### AGREEMENTS ON THE LAW

23. All of the parties agree on the law of the case to the following extent:

24. If the court finds and concludes that the damage to the Barge "EK-9" was proximately caused by the sole fault of the operators of the tug "Charles T", or any of them, a judgment in favor of the libelants should be entered against the bondsman of the tug "Charles T".

25. If the court finds and concludes that the damage to the Barge "EK-9" was proximately [84] caused by the sole fault of the operators of the "Karl Liebknecht", or any of them, a judgment in favor of libelants should be entered against the bondsman of the "Karl Liebknecht".

26. If the court finds and concludes that the damage to the Barge "EK-9" was proximately caused or contributed to by faults on the part of the operators of the tug "Charles T", or any of them, and the operators of the "Karl Liebknecht", or any of them, a judgment should be entered in favor of the libelants against the bondsman of the tug "Charles T" and the bondsman of the "Karl Liebknecht". In such an event, the judgment in favor of libelants should be in the full amount against each of said bondsmen, jointly and severally, with only one satisfaction, however, in favor of the libelants and with rights of contribution as between said bondsmen in equal shares to each.

27. If as between the Willamette Company and C. T. Smith and Son the court should hold that the Willamette Company was the operator of the tug "Charles T" at and before the time and place of the collision and assumed the duties, obligations and liabilities of such operation, and, in addition, if the court holds that the damage to the Barge "EK-9" was proximately caused or contributed to by the fault of the operators of the "Charles T", or any of them, then and in such event a judgment in favor of the libelants should be entered against the Willamette Company, in personam, in addition to the



judgment against the bondsman of the tug "Charles T" and against the bondsman of the "Karl Liebknecht", if such bondsmen should also be liable under the principles described in paragraph 26 of this pre-trial order. Such judgment should be entered in the [85] full amount against each and any of said parties who may be thus liable, with only one satisfaction, however, and such judgment should protect and enforce the appropriate rights of contribution between those held liable. Such a judgment should further provide that as between the Willamette Company and C. T. Smith and Son, the Willamette Company should be held liable to indemnify C. T. Smith and Son and the bondsman of the tug "Charles T" in respect to such amounts as either or any of them might be called to pay to or for the libelants under such a judgment.

### QUESTIONS TO BE DETERMINED

28. Was the collision proximately caused or contributed to by the fault or faults of the operators of the tug "Charles T", or any of them, in any of the particulars set forth in paragraph 14 of this pre-trial order?

29. Was the collision proximately caused or contributed to by the fault or faults of the operators of the "Karl Liebknecht", or any of them, in any of the respects named in paragraph 15 of this pre-trial order?

30. As between the Willamette Company and C. T. Smith and Son, which party was the operator of

the tug "Charles T" at and before the time and place of the collision, and which party assumed the duties and obligations and liabilities of such operation?

31. What was the extent of the damage suffered by the Barge "EK-9", and what is the amount of the recovery therefor?

32. Are libelants, or either of them, entitled to recover if damage is found under paragraph 31 above? [86]

33. In what manner should costs be assessed or apportioned, and should C. T. Smith and Son recover their proctor's fees from the Willamette Company?

#### EXHIBITS IDENTIFIED UPON PRE-TRIAL

Libelants' Exhibit 1 for identification, navigation chart Columbia River.

Libelants' Exhibit 2 for identification, navigation chart Columbia River.

Libelants' Exhibit 3 for identification, survey report.

Libelants' Exhibit 4 for identification, O.P.A. ceiling prices, Klepp Marine Ways.

Libelants' Exhibit 5 for identification, corrected invoice, Klepp Marine Ways.

Libelants' Exhibit 6 for identification, invoice, services and barge depreciation, Ole Ericksen.

Libelants' Exhibit 7 for identification, blueprint showing wracking of barge.

Libelants' Exhibit 8 for identification, photograph of barge damage.

Libelants' Exhibit 9 for identification, Willamette Tug & Barge Company tow bill.

Libelants' Exhibit 9A Contract F.

Claimant Purchasing Commission's Exhibit 10, being deposition of Z. F. Ivashin and V. S. Zamaitin.

Stipulation on certain facts between C. T. Smith and Son and Willamette Company—Exhibit 11.

Respondent Willamette Tug and Barge Company's Exhibit 12—check No. A-680.

Respondent Willamette Tug and Barge Company's Exhibit 13—duplicate of check with statement of account.

Respondent Willamette Tug and Barge Company's Exhibit 14—statement of C. T. Smith and Son under date of June 22, 1944.

This pre-trial order represents the result of pre-trial conferences between the parties, their proctors and the Judge presiding in open court. This order supersedes the pleadings, which have no further [87] function in this case, and shall not be changed after signature or during trial except by agreement of the parties and the court or on order of the court, to prevent manifest injustice. June 20th, 1945.

/s/ JAMES ALGER FEE,  
Judge.

[Endorsed]: Filed June 20, 1945. [88]

[Title of District Court and Cause]

## OPINION

December 29, 1945

James Alger Fee, District Judge:

Upon the issue between claimants and respondent as to whether the agreement was for a demise or a simple affreightment, the contract was oral. The usual construction of such an agreement is against a demise. There are some circumstances which strengthen this view such as the fact that master and crew were employees of claimants. But this is overridden by the fact that respondent gave orders directly affecting management of tug and tow in navigation, placed its own pilots aboard under certain circumstances, and generally assumed control thereof. On the particular journey, the master was directed how to handle the tug and tow and was furnished with a bridle for the purpose of towing astern. The tug was ordered to take the tow below Longview. This respondent could do because its license from the Interstate Commerce Commission [89] permitted this with its own boats or those under demise, whereas claimants' license would not permit such a movement. Construing the contract as the parties did by these acts, there was a demise. But whatever the original idea for this journey, at least the full responsibility was taken by respondent. For that journey at least, there was a

charter pro hac vice and complete control by the respondent.

As to damages, the court allows:

Cost of towage, which is admitted, \$38.00.

Cost of repairs, \$8,877.10.

Some of these items are questioned, but the testimony seems to support the amount as reasonable.

Libellants are entitled to be made whole.

Permanent depreciation, \$1,500.00.

An owner's opinion (estimate of \$5,000) is subject to criticism. It is not binding upon the trier of the fact. The amount of damage and the testimony as to the weakening justify the court in assessing a reasonable amount as permanent damage.

Supervision of repairs, \$700.00.

This could have been done by libelant or another. In either event it should be paid for. It lessened the amount of the permanent damage.

Findings may be prepared.

[Endorsed]: Filed Jan. 14, 1946.

[90]

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[Title of District Court and Cause]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW.

### FINDINGS OF FACT.

#### I.

Libelants Ole Ericksen and the Pacific Building Materials Company, a corporation, are respectively the owner and charterer of the Barge "EK-9," and

are jointly and severally interested in any recovery which may be made herein by reason of the damage to said barge.

## II.

At and before the time and place of the collision, those in charge of the navigation of the tug "Charles T" failed to keep and maintain a proper lookout and failed to see or observe the approach of the steamship "Karl Liebknecht," and failed to keep their said tow of barges out of the way of said steamship. The said tug and her navigation was in charge of an inexperienced deckhand who knew nothing about navigation or the channel or the [91] beacons or river conditions, and as the vessels approached each other lost his head and did not know what to do. The master of said tug was, during all the time until the collision was imminent, asleep, and the said collision was caused in part by the fault of the said deckhand in cutting across the bow of the "Karl Liebknecht" without blowing a passing whistle or without giving any warning whatever of what he was going to do.

## III.

The acts and failures described in the preceding paragraph of those in charge of the navigation of the tug "Charles T" were negligent and were the proximate cause of the collision.

## IV.

The parties in charge of the navigation of the "Karl Liebknecht" at and before the time and place



of the collision failed to keep a good lookout; failed to keep to their own starboard side of the channel; failed to sound passing or warning signals; failed to slow, stop or reverse their engines when danger of collision was or should have been apparent; failed to alter their course to their starboard in order to avoid a collision.

#### V.

The acts and failures of those in charge of the navigation of the "Karl Liebknecht" were negligent and were the proximate cause of the collision.

#### VI.

As a result of said collision the Barge "EK-9" was damaged and made less valuable by the following items: cost of towage, \$38.00, cost of repairs \$8,877.10, permanent depreciation, \$1500.00, supervision of repairs by Ole Ericksen, \$700.00, Total \$11,115.00; with interest at six per cent per annum on the above amounts from and after date [92] of repairs, July 28, 1944.

#### VII.

At and before the time and place of the collision, the claimants of the tug "Charles T", C. T. Smith and Esson H. Smith, copartners doing business as C. T. Smith and Son, did charter, transfer, and deliver to the Willamette Tug and Barge Company, the entire custody, management and control of the tug "Charles T", including the entire command and control over its navigation; that during these times the tug "Charles T" was engaged in moving com-



modities aboard non-self-propelled vessels in interstate commerce, and made trips below Longview, Washington, which movements could not have been performed under the Interstate Commerce Commission operating authority of C. T. Smith and Son, whose certificate was limited to performing general towage only to, and not below, Longview, Washington; that the said Willamette Tug and Barge Company operated the said tug under authority contained in its certificate from the Interstate Commerce Commission which authorized both the movements of commodities on non-self-propelled vessels with the use of separate towing vessels and general towing to points on the Willamette River below Portland and on the Columbia River below Vancouver, and invoiced its customers in its own name and not in the name of C. T. Smith and Son for the towage movements performed by the said tug; and, on this particular voyage, the Willamette Tug and Barge Company directed the master of the tug how to handle the tug and tow, and furnished a bridle for the purpose of towing astern. The Willamette Tug and Barge Company was the charterer and operator of the tug "Charles T", and the master and deckhand of the said tug, [93] to-wit: Charles Bates and Lloyd Chappell, respectively, were at said time and place servants and agents of the Willamette Tug and Barge Company.

#### CONCLUSIONS OF LAW.

(1) The collision was proximately caused by the combined faults of the navigators of respectively

the Tug "Charles T", and the steamship "Karl Lieb knecht."

(2) The Willamette Tug and Barge Company, as charterer pro hac vice of the tug "Charles T" was and is responsible for the faults of the navigators of the Tug "Charles T."

(3) The Libelants jointly and severally are entitled to a decree for the full amount of their damages, together with the interest against each of the following named parties: C. T. Smith and Esson H. Smith, claimants of the Tug "Charles T" and General Casualty Company, as surety on behalf of the Tug "Charles T," the Government Purchasing Commission of the Soviet Union in the U. S. A. and United States Fidelity & Guaranty Company, as claimant and surety for the Steamship "Karl Lieb knecht," and the Steamship "Karl Lieb knecht" and the Willamette Tug and Barge Company; but libelants together are entitled to only one satisfaction of said decree.

(4) As between the Steamship "Karl Lieb knecht" and the claimant and bondsmen thereof on the one hand, and the Willamette Tug and Barge Company on the other hand, said parties shall finally pay, divide and bear equally between them, the judgment of the libelants and the whole thereof.

(5) C. T. Smith and Son and their bondsmen are entitled to a judgment against the "Karl Lieb knecht," [94] its claimant and bondsmen, for any amount they may be required to pay of the libelant's

judgment over one-half thereof and are entitled to a judgment against the Willamette Tug and Barge Company for the entire amount of the libelant's judgment which they may be required to pay.

(6) Willamette Tug and Barge Company is entitled to a judgment against the "Karl Liebknecht," its claimant and bondsmen, for any amount it may be required to pay of the libelant's judgment over one-half thereof.

(7) The "Karl Liebknecht," its claimant and bondsmen, are entitled to judgments against the Willamette Tug and Barge Company and C. T. Smith and Son, for any amount they may be required to pay of the libelant's judgment over one-half thereof.

Dated March 11th, 1946.

/s/ JAMES ALGER FEE,  
Judge.

[Endorsed]: Filed March 11, 1946.

[95]

In the District Court of the United States  
For the District of Oregon

No. Civil 2489

OLE ERICKSEN and PACIFIC BUILDING  
MATERIALS COMPANY, a corporation,  
Libelants,

vs.

DIESEL TUG "CHARLES T", C. T. SMITH and  
ESSON H. SMITH, co-partners doing busi-  
ness as C. T. SMITH AND SON, Claimants  
of the Tug "CHARLES T", WILLAMETTE  
TUG AND BARGE COMPANY, a corpora-  
tion,

Respondent,

Steamship "KARL LIEBKNECHT".

### FINAL DECREE

This cause came on for trial on the 22nd day of June, 1945. The libelant, Ole Ericksen, appeared in person and by his proctor, Gunther F. Krause. The libelant, Pacific Building Materials Company, appeared by its general manager, Frank Pene-packer, and by its proctor, MacCormac Snow. The claimant, C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, appeared by its manager, Esson H. Smith, and by its proctors, Thomas J. White and Samuel H. Bear. The Government Purchasing Commission of the Soviet Union in the U.S.A. appeared by its proc-tors, Erskine Wood and Lofton L. Tatum. The

Willamette Tug and Barge Company appeared by its general manager, Arthur A. Riedel, and its proctor, L. A. Recken. The Court heard the testimony and examined the exhibits, adduced and brought into Court by the parties and heard the arguments and examined the briefs of the respective proctors. The Court being then advised did render an opinion and did enter Findings of Fact and Conclusions of Law covering the contested issues of fact and law.

Now, Therefore, It Is Considered, Ordered, Adjudged and Decreed as follows:

1. The libelants shall jointly and severally have and recover of and from C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, and General Casualty Company, claimants and bondsmen of the Tug "Charles T", and The Government Purchasing Commission of the Soviet Union in the U.S.A. and United States Fidelity & Guaranty Company, claimants and bondsmen of the Steamship "Karl Liebknecht", and the Steamship "Karl Liebknecht" and Willamette Tug and Barge Company, an Oregon corporation, and each of them, the full sum of \$11,115.10, with interest thereon at six per cent per annum from and after July 28, 1944.

2. Libelants between them shall, however, have only one satisfaction of this judgment.

3. C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, and General Casualty Company, claimants and bondsmen of the Tug "Charles T", shall have and recover of and



from the Government Purchasing Commission of the Soviet Union in the U.S.A. and the United States Fidelity & Guaranty Company, claimants and bondsmen of the Steamship "Karl Liebknecht" and the Steamship "Karl Liebknecht", such amount as they may be required to pay of the judgment of the libelants hereinbefore set forth over one-half thereof and shall have and recover of and from Willamette Tug and Barge Company the entire amount of the said libelants' judgment which they may be required to pay.

4. Willamette Tug and Barge Company shall have and recover of and from the Government Purchasing Commission of the Soviet Union in the U.S.A. and United States [97] Fidelity & Guaranty Company, claimants and bondsmen of the Steamship "Karl Liebknecht" and the Steamship "Karl Liebknecht", such amount as said Willamette Company may be required to pay of the judgment in favor of the libelants above set forth over one-half thereof.

5. The Government Purchasing Commission of the Soviet Union in the U.S.A. and the United States Fidelity & Guaranty Company, claimant and bondsmen of the Steamship "Karl Liebknecht" and the said Steamship "Karl Liebknecht", shall have and recover of and from Willamette Tug and Barge Company and C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, and General Casualty Company, claimants and bondsmen of the Tug "Charles T", such amount as they may be required to pay of the judgment in

favor of the libelants above set forth over one-half thereof.

6. Let the Clerk issue and lodge with the Marshal of this Court such appropriate Writs of Execution as will carry this judgment into full force and effect.

Dated March 11th, 1946.

/s/ JAMES ALGER FEE,  
Judge.

[Endorsed]: Filed March 11, 1946. [98]

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[Title of District Court and Cause.]

### PETITION FOR APPEAL

Willamette Tug and Barge Company, a corporation, Respondent, being aggrieved by the final decree, rulings and findings of the District Court in the above entitled cause, claims an appeal from said decree, rulings and findings.

On this appeal the Respondent, Willamette Tug and Barge Company, a corporation, desires only to review the following questions:

1. The District Court of the United States for the District of Oregon erred in holding and decreeing that the Libelants should recover from the Respondent Willamette Tug and Barge Company the repairs by Ole Erickson, one of the Libelants. Resum of \$1500.00 permanent depreciation, and the spondent does not claim any error or contend that



the court erred in awarding to Libelants the cost of repairing the barge, but does contend that the item for permanent depreciation and supervision of repairs should not be allowed.

2. The District Court of the United States for the District of Oregon erred in holding and decreeing that at the time and [99] place of the collision between the "Karl Liebknecht" and the Barge "EK-9" being towed by the Tug "Charles T", that the Claimants C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, did charter, transfer and deliver to the Willamette Tug and Barge Company the entire custody, management and control of the Tug "Charles T", including the entire command and control of its navigation; and the holding that the Willamette Tug and Barge Company was the charterer of the Tug "Charles T" and that the master and deckhand of the said "Charles T", to-wit: Charles Bates and Lloyd Chappell, respectively, were at the time of the collision servants and agents of the Willamette Tug and Barge Company, a corporation; and in holding and decreeing that the Willamette Tug and Barge Company is and was a charterer pro hac vice of the Tug "Charles T" and that the said Respondent Willamette Tug and Barge Company was and is responsible for the faults of the navigators of the Tug "Charles T".

Petitioner does not desire to review the findings and decree of the District Court of the United States for the District of Oregon wherein said court held and decreed that the Steamship "Karl

Liebcknecht" and the Diesel Tug "Charles T" were jointly and equally responsible for the collision.

Petitioner prays that its appeal may be allowed.

Dated this 8th day of June, 1946.

WILLAMETTE TUG AND  
BARGE COMPANY,

By /s/ L. A. RECKEN,  
Its Proctor.

The foregoing petition and the appeal therein prayed for are hereby allowed.

.....

United States District Judge.

Due and regular service of the foregoing petition for appeal and order of allowance are hereby accepted this 10th day of June, 1946.

/s/ MacCORMAC SNOW,  
Of Proctors for Libelants Ole Ericksen and Pacific  
Building Materials Company.

/s/ THOMAS J. WHITE,

/s/ SAMUEL H. BEAR,

Proctors for C. T. Smith and  
Esson H. Smith.

/s/ LOFTON L. TATUM,

Of Proctors for Steamship  
"Karl Liebcknecht".

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Lowell Mundorff, Clerk, and Thomas J. White and Samuel Bear, Proctors for Claimants C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, and Erskine Wood, Proctor for Steamship "Karl Liebknecht" and Gunther F. Krause and MacCormac Snow, Proctors for Libelants Ole Erickson and Pacific Building Materials Company, a corporation,

Sirs:

Please take notice that the Willamette Tug and Barge Company, a corporation, Respondent in the above entitled cause hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this court entered herein on the 11th day of March, 1946; and said Willamette Tug and Barge Company only desires to review on appeal the following questions: [102]

1. The District Court of the United States for the District of Oregon erred in holding and decreeing that the Libelants should recover from the Respondent Willamette Tug and Barge Company the sum of \$1500.00 permanent depreciation, and the further sum of \$700.00 on account of supervision of repairs by Ole Ericksen, one of the Libelants. Respondent does not claim any error or contend that the court erred in awarding to Libelants the cost of repairing the barge, but does contend that the item

for permanent depreciation and supervision of repairs should not be allowed.

2. The District Court of the United States for the District of Oregon erred in holding and decreeing that at the time and place of the collision between the "Karl Liebknecht" and the Barge "EK-9" being towed by the Tug "Charles T", that the Claimants C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, did charter, transfer and deliver to the Willamette Tug and Barge Company the entire custody, management and control of the Tug "Charles T", including the entire command and control of its navigation; and the holding that the Willamette Tug and Barge Company was the charterer of the Tug "Charles T" and that the master and deckhand of the said "Charles T", to-wit: Charles Bates and Lloyd Chappell, respectively, were at the time of the collision servants and agents of the Willamette Tug and Barge Company, a corporation; and in holding and decreeing that the Willamette Tug and Barge Company is and was a charterer pro hac vice of the Tug "Charles T" and that the said Respondent Willamette Tug and Barge Company was and is responsible for the faults of the navigators of the Tug "Charles T". [103]

Dated June 6, 1946.

Respectfully,

/s/ SENN & RECKEN,

Proctors for Willamette Tug  
and Barge Co., Respondent.

Due and regular service of the foregoing Notice of Appeal is hereby accepted this 8th day of June, 1946.

/s/ MacCORMAC SNOW,

Proctors for Libelants Ole Erick-  
sen and Pacific Building Ma-  
terials Company.

/s/ THOMAS J. WHITE,

/s/ SAMUEL K. BEAR,

Proctors for C. T. Smith and  
Esson H. Smith.

/s/ LOFTON L. TATUM,

Proctors for Steamship "Karl  
Liebknecht".

The within appeal is hereby allowed this.....  
day of June, 1946.

.....,  
United States District Judge for the District of  
Oregon.

[Endorsed]: Filed June 10, 1946. [104]

[Title of District Court and Cause.]

### ASSIGNMENT OF ERRORS

The Willamette Tug and Barge Company, respondent, hereby assigns errors in the proceedings, decisions and decree of the United States District Court for the District of Oregon as follows:

1. In holding that the libelants shall recover from the respondent, Willamette Tug and Barge Company, an Oregon corporation, the full sum of \$11,115.10 with interest thereon at 6% from and after July 28, 1944.

2. In holding that C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, shall have and recover of and from Willamette Tug and Barge Company the entire amount of the libelants' judgment which C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, may be required to pay.

3. In finding that at and before the time and place of the collision between the "Karl Liebknecht" and the barge "EK-9" being towed by the tug "Charles T", that the said C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, [105] did charter, transfer and deliver to the Willamette Tug and Barge Company the entire custody, management and control of the tug "Charles T", including the entire command and control of its navigation; and in holding that the Willamette Tug and Barge Company was the charterer of the Tug "Charles T" and that the master and deckhand of the said tug "Charles T", to-



wit: Charles Bates and Lloyd Chappell, respectively, were at the time of the collision servants and agents of the Willamette Tug and Barge Company, a corporation; and in holding that the Willamette Tug and Barge Company is and was a charterer pro hac vice of the tug "Charles T", and that said Willamette Tug and Barge Company was and is responsible for the faults of the navigators of the tug "Charles T".

4. In finding and holding that the barge "EK-9" was damaged and made less valuable by the following items: permanent depreciation, \$1500.00, supervision of repairs by Ole Ericksen, \$700.00.

5. In failing to hold that under all of the facts and evidence in this case, the Willamette Tug and Barge Company, a corporation, and the said C. T. Smith and Esson H. Smith were engaged in nothing more than a contract of affreightment, and that the said C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, retained full control, supervision and management of the Tug "Charles T".

6. In failing to decree that the Willamette Tug and Barge Company, a corporation, was entitled to a decree of dismissal herein and a judgment as against the said C. T. Smith and Esson H. Smith for its costs and disbursements.

Respectfully,

/s/ SINN & RECKEN,

Proctors for Willamette Tug  
and Barge Company, Re-  
spondent. [106]

Due and regular service of the foregoing Assignment of Errors is hereby accepted this 10th day of June, 1946.

/s/ MacCORMAC SNOW,  
Of Proctors for Libelants Ole Erickson and Pacific  
Building Materials Company.

/s/ THOMAS J. WHITE and  
SAMUEL H. BEAR,  
Proctors for C. T. Smith and  
Esson H. Smith.

/s/ LOFTON L. TATUM,  
Of Proctors for Steamship  
"Karl Liebknecht".

[Endorsed]: Filed June 10, 1946. [107]

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[Title of District Court and Cause.]

### SUPERSEDEAS BOND

Know All Men By These Presents, that we, Willamette Tug and Barge Company, an Oregon corporation, as principal, and Glens Falls Indemnity Company of Glens Falls, New York, a corporation, as surety, and licensed in Oregon to become surety on bonds and undertakings, are held and firmly bound unto Ole Ericksen and Pacific Building Materials Company, a corporation, and C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, in the full and just sum of \$15,000.00, to be paid to the said Ole Ericksen and Pacific Building Materials Company, a corporation, and to C. T. Smith and Esson H. Smith, co-partners

doing business as C. T. Smith and Son, their executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of June in the year of our Lord One Thousand Nine Hundred and Forty-six.

Whereas, lately at a District Court of the United States for the District of Oregon in a suit pending in said Court, between [109] Ole Ericksen and Pacific Building Materials Company, a corporation, as Libelants, and Diesel Tug "Charles T", C. T. Smith and Esson H. Smith, co-partners doing business as C. T. Smith and Son, claimants of the Tug "Charles T", and Willamette Tug and Barge Company, a corporation, as Respondent, and the Steamship "Karl Liebknecht," a decree and judgment was rendered against the said Willamette Tug and Barge Company, a corporation, and the said Willamette Tug and Barge Company, a corporation, having filed in said Court a notice of appeal to reverse the judgment and decree in the aforesaid suit, on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said Willamette Tug and Barge Company, a corporation, shall prosecute said appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay,

if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal]

WILLAMETTE TUG AND  
BARGE COMPANY a Cor-  
poration,

By /s/ ARTHUR A. RIEDEL,  
President,  
Principal.

GLENS FALLS INDEMNITY  
COMPANY of Glens Falls, New  
York,

By /s/ J. STUART LEAVY,  
Surety.

Countersigned:

JEWETT, BARTON, LEAVY  
and KERN,

By /s/ J. STUART LEAVY,  
Resident Agents. [110]

Due and regular service of the foregoing Supersedeas Bond on appeal is hereby accepted this 10th day of June, 1946.

/s/ MacCORMAC SNOW,

Of Proctors for Libelants Ole Ericksen and Pacific Building Materials Company.

/s/ THOMAS J. WHITE and

SAMUEL H. BEAR,

Proctors for C. T. Smith and  
Esson H. Smith.

/s/ LOFTON L. TATUM,

Of Proctor for Steamship  
"Karl Liebknecht".

[Endorsed]: Filed June 10, 1946. [111]

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[Title of District Court and Cause.]

### DESIGNATION OF APOSTLES ON APPEAL

The undersigned, Willamette Tug and Barge Company, a corporation, Respondent and Appellant, hereby designates the following as apostles on appeal to the United States Circuit Court of Appeals of the Ninth Circuit, to-wit:

- (a) The style of the Court.
- (b) The names of all of the parties.
- (c) The libel with all exhibits annexed thereto.

(d) The pleadings of the libelants and claimants and respondent, together with the exhibits thereto.

(e) The testimony taken on the part of the libelants and claimants and respondent, and all exhibits not annexed to the pleadings.

(f) The pre-trial order of this Court, and the opinion of this Court determining the liability of each of the parties and the damages; the final findings of fact, conclusions of law and final decree dated March 11, 1946.

(g) The petition for and order allowing appeal, assignment of errors, citation, supersedeas bond and praecipe for apostles. [118]

Due and regular service of the foregoing designation of Apostles on Appeal is hereby accepted this 10th day of June, 1946.

/s/ MacCORMAC SNOW,  
Of Proctors for Libelants Ole Erickson and Pacific  
Building Materials Company.

/s/ THOMAS J. WHITE,  
/s/ SAMUËL H. BEAR,  
Proctors for C. T. Smith and  
Esson H. Smith.

/s/ LOFTON L. TATUM,  
Of Proctors for Steamship  
"Karl Liebknecht".

And the undersigned, Willamette Tug and Barge Company, a corporation, does hereby request the



Clerk of the District Court of the United States for the District of Oregon to prepare and issue the above Apostles on Appeal.

WILLAMETTE TUG AND  
BARGE COMPANY,  
A Corporation.

By /s/ SENN & RECKEN,  
Its Proctors.

[Endorsed]: Filed June 10, 1946. [119]

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CLERK'S CERTIFICATE

United States of America,  
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 123 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 2489, in which Willamette Tug and Barge Company, a corp. is respondent and appellant and Ole Ericksen and Pacific Building Materials Co. a corp., Diesel Tug "Charles T"; C. T. Smith and Esson Smith, co-partners dba C. T. Smith and Son, Claimants of the Tug "Charles T" and Steamship "Karl Lieb-knecht" are appellees; that said transcript has been prepared by me in accordance with the designation

of contents of the record on appeal filed by the appellants and counter designation of Apostles on Appeal filed by C. T. Smith and Esson Smith, and in accordance with the rules of court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation and counter designation, as the same appears of record and on file at my office and in my custody.

I am also inclosing herewith transcript of proceedings dated June 20, 21 and 22, 1946, and original exhibits 1 to 3 and 5 to 14 inclusive.

I further certify that the cost of comparing and certifying the within transcript is \$71.45 and that the same has been paid by said appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 17th day of July, 1946.

[Seal]                      LOWELL MUNDORFF,  
Clerk.

By /s/ F. L. BUCK,  
Chief Deputy Clerk.                      [123]

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[Title of District Court and Cause.]

### PROCEEDINGS

Friday, June 22, 1945, at the hour of 10:10 o'clock a.m., the trial of the above-entitled cause was resumed and continued as follows:

The Court: You may proceed, gentlemen.

Mr. White: Captain Bates.

CHARLES RICHARD BATES

was thereupon recalled as a witness in behalf of the Claimants herein and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. White:

Q. You have previously testified in this matter that you were the Captain of the Charles T.

A. Yes.

Q. Captain, who paid your salary?

A. Esson Smith.

Q. When? Was it during all the times that you were working on the boat? A. Yes.

Q. Do you recall the instructions that Mr. Smith gave you when the boat was sent to the Willamette Tug and Barge Company?

A. Oh, he told me to take and run the Charles T. to Portland, told me how to get the Willamette Tug and Barge, and when I got there I was to take orders from them——

Mr. Recken: Just a moment. Your Honor, we object to that as [211] not binding on the Respondent, Willamette Tug and Barge Company, because we weren't there. This is a conversation between the Smiths and this man. It would be self-serving and would not be binding on us.

Mr. White: If the Court please,——

(Testimony of Charles Richard Bates.)

The Court: Well, anyhow, I will hear the testimony, subject to the objection.

Mr. White: Proceed.

A. Well, when I got there I was to take further orders from the Willamette Tug and Barge; they had the rest—we was just to go to there and they give the rest of the orders, that was all.

Q. What date was that?

A. Well, I don't know exactly what date it was.

Q. Prior to the collision approximately how long was it? A. Oh, a month, anyway.

Q. A month, anyhow? A. Yes.

Q. Now, during that period from the time that you took the boat to the Willamette Tug and Barge Company to the time of the collision who did you take your instructions from?

A. The company, you mean? I took it from the dispatcher of Willamette Tug and Barge, and once in a while from Mr. Riedel.

Q. How were these orders given to you?

A. Well, some of it was given orally and some of them they wrote it out on a little piece of paper, where I was to go. [212]

Q. Did they tell you how to do your work, in addition to where to go?

A. Why, yes, in a way they did, told us where to go and how to—once in a while they would tell us which way to go, like down through the slough if they was having a trial run on the river there with ships.

(Testimony of Charles Richard Bates.)

Q. They would tell you what channels to use, is that right?      A. Yes.

Q. Did you ever do any miscellaneous work, such as furnishing supplies for Willamette Tug and Barge Company's other boats?

A. Doing what?

Q. Did you ever get, say, any oil drums for other boats of the Willamette Tug and Barge?

A. Yes, we have run over to the oil docks and brought over a barrel of oil for the barge, and stuff like that, just run around and——

Q. Now, during this period the boat was—pardon me, I will reframe my question. Where was the boat kept during this period when not in use?

A. At their moorage, tied up at their moorage.

Q. At whose moorage?

A. The Willamette Tug and Barge.

Q. Was the boat during that period ever at the moorage of C. T. Smith and Son?

A. No, it was not. [213]

Q. Where is their moorage?

A. C. T. Smith and Son, you mean?

Q. Yes.      A. It is at Stevenson, Washington.

Q. Did you during that period ever receive any orders concerning the navigation of the boat or any other orders pertaining to the Tug Charles T. from Esson Smith or C. T. Smith?

A. No, I never.

Q. Now, on the day of the collision, when you were preparing the boat to tow the three barges,

(Testimony of Charles Richard Bates.)

one of which was involved in the collision, did the officials of the Willamette Tug and Barge Company give you any special orders relative to the making up of the tow?

A. Well, they told us to take them down on a towline, and asked us if we had a bridle, and we never had no bridle, so they says get the one they had on the Henry J. That is one of their own tugs.

Q. They furnished you the towing bridle?

A. Yes.

Q. How do you usually move barges?

A. Push them on the bow of the boat, on one side.

Q. And who gave you these orders to use a towing bridle?

A. Howard Brands, I believe the name was, Mr. Howard Brands.

Q. And who was he?

A. He was a dispatcher for the Willamette Tug and Barge. [214]

Q. Now, during the time that you were towing for the Willamette Tug and Barge where did you go on the river?

A. Oh, we ran from Portland harbor to Longview and to Beaver and to Vancouver.

Q. Where is Beaver?

A. Twelve miles below Longview by river.

Q. Is Beaver in Oregon? A. Oregon.

Q. Now, Mr. Bates, in going from Portland to Beaver is it necessary to cross the thread of the



(Testimony of Charles Richard Bates.)

channel in making that tow or in moving barges?

A. What do you mean by the thread of the channel?

Q. The middle of the channel of the river.

A. Oh, yes, we would go across the river several times back and forth from the Oregon side.

Q. And did you go back and forth several times from the Washington side to the Oregon side on those particular runs you made down to Beaver?

A. Yes.

Q. Now, after the collision who did you report to?

A. I called Art Riedel's residence. It was late at night. His wife answered and he wasn't there or something, and then I guess she had notified the dispatcher, and he called me back then to have me explain what happened.

Q. And did he give you any instructions? [215]

A. Yes; he says to bring the other barges back up that we went down after.

Q. And who is Art Riedel that you just mentioned?

A. I don't know. He is the boss or owner or something of the Willamette Tug and Barge.

Mr. White: I have no further questions.

### Cross-Examination

By Mr. Recken:

Q. Captain, you never knew the Willamette Tug and Barge prior to April of 1944, did you?

(Testimony of Charles Richard Bates.)

A. That is when we first went to work for them.

Q. And you brought the Charles T. down to the Willamette Tug and Barge moorage?

A. Yes.

Q. And isn't it a fact that on different occasions you tied up at the oil docks over night?

A. No, not no oil dock.

Q. You were never tied up at the oil docks?

A. No.

Q. Did you never make any trips up to Stevenson?

A. With the tug?

Q. Yes. A. No.

Q. Or go up there during the week days, in April or May?

A. Oh, I went through there to go home to The Dalles. I live in [216] The Dalles. On a week-end I went up through there.

Q. You went up to Stevenson to get groceries, did you?

A. Yes.

Q. Did you do your cooking on the boat?

A. Yes.

Q. Who furnished the food?

A. Smith did.

Q. Who furnished the gasoline?

A. Didn't use no gasoline.

Q. Or the Diesel oil? It is a Diesel engine, isn't it?

A. Mr. Smith furnished the Diesel.

Q. And isn't it a fact that all they told you at different times when they had a tow that you were

(Testimony of Charles Richard Bates.)

to take the tow to a certain place? That was all the orders that were given you?

A. From the Willamette Tug and Barge, you mean?

Q. Yes.           A. Yes.

Q. Tell you to go to one place and pick up a barge and take it down there?

A. Well, they would tell us where to take it to, and once in a while they would tell us what to do with it, where to go.

Q. They never told you how to navigate the boat or at what speed to travel or what to do?

A. No; that is,——

Q. Uh, huh,—and you were in full custody of that boat, weren't [217] you, as skipper——

A. Yes.

Q. ——and master of the Charles T.? You were the only one that had the control of that?

A. I had the running of it.

Mr. Recken: I think that is all.

Mr. Tatum: No questions.

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### Redirect Examination

By Mr. White:

Q. Captain, did the Willamette Tug and Barge Company ever furnish one of their pilots to go on the boat?

A. Yes, when they told us to go down the slough, why, I had never been down the slough before, and they furnished a captain to go down.

Mr. White: I think that is all.

(Testimony of Charles Richard Bates.)

Mr. Recken: No further questions.

Mr. White: That is all.

(Witness excused.)

Mr. White: Mr. Chappell. [218]

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LLOYD CHAPPELL,

was thereupon recalled as a witness in behalf of the Claimants herein and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. White:

Q. Mr. Chappell, did you hear the testimony of Captain Bates? A. Yes, sir.

Q. Were you present when the dispatcher of the Willamette Tug and Barge Company informed Mr. Bates, the day of the accident, to use a bridle?

A. Yes, I was.

Q. In towing the three barges?

A. I was there.

Q. You will confirm Mr. Bates' testimony?

A. Yes.

Mr. White: That is all I have.

Cross Examination

By Mr. Recken:

Q. Now, just a moment, Mr. Chappell,—

A. Yes.

Q. In fact, the only thing was that the barges were to be taken in tandem, weren't they?

(Testimony of Lloyd Chappell.)

A. Yes, sir.

Q. And, of course, that was the only way to take them that way, with a bridle tow, wasn't it?

A. Well,——

Q. Or do you know?

A. All I know is that Mr. Bates claimed that it was much easier to push them, that is all.

Mr. Recken: That is all.

#### Redirect Examination

By Mr. White:

Q. Mr. Chappell, how did you usually move barges with the Charles T.?

A. Well, usually pushed them.

Q. Did you always push them? Do you recall any other instance when you towed them?

A. Well, that is the only time that I remember when we didn't push them.

Mr. White: I have no further questions.

#### Recross Examination

By Mr. Recken:

Q. Just a minute, Mr. Chappell. That is the only time that you ever did have three barges, however, at one time, isn't it?

A. Well, I couldn't say definitely, but I think we have pushed that many.

Mr. Recken: That is all.

Mr. White: That is all.

(Witness excused.)

Mr. White: Captain Smith. [220]

## ESSON H. SMITH,

was thereupon produced as a witness in behalf of the Claimants herein and, having been first by the Court duly sworn, was examined and testified as follows:

The Court: Give your name to the reporter.

A. Esson H. Smith.

## Direct Examination

By Mr. White:

Q. Where do you reside, Mr. Smith?

A. Stevenson, Washington.

Q. What is your business?

A. Log towing and general—I have general towing rights from—I.C.C. rights from Alderdale to Longview, Washington.

Q. What company do you work for?

A. C. T. Smith and Son.

Q. What is the legal status of that company?

A. Pardon?

Q. What is the legal status of that company?

A. It is a partnership between my father and myself. I am the operating manager.

Q. How many boats do you operate?

A. Four.

Q. And how long has C. T. Smith been engaged in the towing business?      A. Since 1933.

Q. Do you operate a boat yourself?

A. Quite frequently. [221]

Q. Does your firm have any barges?

A. No.



(Testimony of Esßon H. Smith.)

Q. Do you have any authority to carry commodities on barges?

A. No, I have no authority to carry—the fact is, I have no authority to go below Longview and no authority to carry commodities on barges.

Q. And when you say “authority” do you mean Interstate Commerce authority? A. Yes.

Q. Now, have you operated vessels on the Columbia River between Portland and Beaver, Oregon?

A. Not to—not to Beaver, but I have been further down the river than Beaver towards Astoria.

Q. Now, how many times have you so operated a vessel, over what period?

A. Well, I would say I have been over the river a couple of dozen times.

Q. Now, would it be possible, Mr. Smith, to take a—excuse me, I didn’t mean possible, but in the ordinary course of towing a vessel between Portland and Beaver would it be possible—is it usual for such a vessel to pass on each side of the thread of the channel?

A. Well, generally in the operation of a boat you cross the thread of the channel. However, it would be possible to go all the way on one side, but not probable. [222]

Q. Did you represent your firm in making arrangements with the Willamette Tug and Barge for the use of the Tug Charles T.? A. I did.

Q. Please tell, in your own words, the circum-

(Testimony of Esson H. Smith.)

stances leading up to the making of the contract and the actual occurrence of the contract.

A. About thirty days before the boat went down there I had a conversation with Mr. Riedel over the phone in regard to the charter of the boat and he said that we would get together at a later date, and on April 4, 1945, I went to Mr. Riedel's office—rather, he called me two days before that, that he wanted the boat the next day, and I went down to his office and talked to him about it and we agreed that he would charter the boat and I would pay all operating expenses connected with it, Diesel oil and lube oil and groceries, wages, and that I was to take 80 per cent. of the gross revenue earned by the boat; Willamette Tug and Barge were to do all the collections, make all the collections, make all the billings, and pay on the 10th of the following month.

Q. Now, was that your contract or agreement with Willamette Tug and Barge concerning the use of this vessel?           A. It was.

Q. Now, did you know what the Willamette Tug and Barge Company was going to do with this tug?

A. No. I had a general idea as to what they were going to do. I wouldn't say that I did know each move that they were going to [223] make. I knew that they were going to handle barges with it.

Q. You knew the general nature of the busi-

(Testimony of Esson H. Smith.)

ness of the Willamette Tug and Barge Company?

A. Yes.

Q. Now, how long was the tug under charter to the Willamette Tug and Barge Company?

A. Approximately two months.

Q. And where was the tug kept during that period? Was it in their possession?

Mr. Recken: Well, just a moment. That is a conclusion, your Honor.

Mr. White: I agree with counsel.

The Court: Yes.

Mr. White: I withdraw the question.

The Court: Where was it kept?

Mr. White: Q. Where was the tug kept?

A. Well, in Mr. Riedel's and our conversation, that tug was to be kept at his dock, at their moorage, because he said that his boats were kept at Tracey's moorage and he would be on a par with Portland Tug & Barge and other operators in that zone on the charges. In other words, if his boats ran from one zone to another it would cost the customer more, so he specifically stated that he wanted that boat kept at his moorage.

Q. Was that part of the agreement?

A. Yes. [224]

Q. Now, during the period that the Willamette Tug and Barge Company had this tug, the Charles T., did you ever inspect the boat or look at the boat?

A. I never was aboard it until the day it left Portland.

(Testimony of Esson H. Smith.)

Q. What instructions did you give Captain Bates concerning the use of this tug by the Willamette Tug and Barge Company?

Mr. Recken: We will enter our same objection, your Honor.

The Court: I will take the testimony, subject to the objection.

Mr. Recken: Yes.

Mr. White: Answer the question, please.

A. I told Mr. Bates to take the boat to the Willamette Tug and Barge's moorage and that he would receive his instructions there.

Q. Now, did you ever give Mr. Bates any instructions concerning the operation or navigation of this tug—— A. No.

Q. Excuse me—during the time that the Willamette Tug and Barge had the tug? A. No.

Mr. White: I have no further questions.

### Cross-Examination

By Mr. Recken:

Q. Mr. Smith, was there anything said as to how much revenue you were to get from it, from——

A. I was to take 80 per cent. of the amount that the boat earned. [225]

Mr. Recken: Mr. Clerk, will you hand the witness the exhibit, Pre-Trial Exhibit 12, I believe,—it is a check and also counterfoil; I believe they are both attached to one, your Honor, Exhibit 12, the check—or what one is that?

The Clerk: 12 is the check.

(Testimony of Esson H. Smith.)

Mr. Recken: And the counter, the copy. I believe they are both together.

Q. I wish you would examine that check and also the copy. A. Yes.

Q. And it is noted on there that it is for towage, isn't it, for the month of April?

Mr. White: If the Court please, I will object to that question on the same ground that Mr. Recken previously objected to my question. These are checks of the Willamette Tug and Barge Company. It has their writing thereon. They are nothing more than self-serving declarations.

The Court: Received, subject to the objection.

Mr. Recken: Q. Is that correct?

A. This is a check written out by Willamette Tug and Barge Company to C. T. Smith and Son in the amount of *dollars*, and the invoice says "For Towing." However, that is their writing, and at that time there was no trouble between Willamette Tug and Barge and Smith and Son, and I accepted the money.

Q. Well, you cashed the check?

A. That is right. [226]

Q. Before the 10th of May, knowing that it was for towage, and you made no objection whatsoever to that, did you? A. I cashed the check.

Q. You never complained to Mr. Riedel or any Willamette Tug and Barge official that that was incorrect or wrong?

A. Well, I don't see that the wording of a bill written by——

(Testimony of Esson H. Smith.)

Q. Just a moment. I asked you if you made any objection. A. I didn't make any objection.

Mr. White: If the Court please, I object to that question because it calls for a legal conclusion of this witness.

The Court: Overruled.

Mr. White: The witness is not a lawyer.

The Court: Overruled.

Mr. Recken: Will you answer the question?

The Court: He has already.

Mr. Recken: Oh. Mr. Bailiff, will you get the other exhibit,—I think it is 13.

The Clerk: Fourteen?

Mr. Recken: Fourteen? Yes.

Q. I hand you Pre-Trial Exhibit No. 14 and ask what that is?

A. It is a bill rendered by C. T. Smith and Son to Willamette Tug and Barge Company for \$2654.67, which they have not paid.

Q. And that bill was made up by C. T. Smith and Son on the log which was furnished to you by your captain?

A. This bill was made up by going—I had a copy of the log made [227] by my captain and I went to the dispatcher at the Willamette Tug and Barge Company's office and went over the moves with him to see that we had the right amount of moves and that I got the right amount of dollars out of the job. Willamette Tug and Barge never at any time gave me a copy of any of their billings or anything else. I had no way to find out



(Testimony of Esson H. Smith.)

how much money they owed me other than the log.

Mr. Recken: At this time, your Honor, I want to offer in evidence Pre-trial Exhibits No. 12 and No. 13. Your Honor, I was mistaken, I called them 12, but 12 and 13, that's the check and copy of the full check and the stub.

Mr. White: No objection.

The Court: Admitted by stipulation.

(The documents referred to, so offered and received, having been previously marked for identification on pre-trial conference, were thereupon marked received as Respondent's Exhibits 12 and 13.)

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RESPONDENT'S EXHIBIT No. 12

Towing for the month of April, 1944,

by Towboat "Charles T" 1764.20

Less 20% as Agreed 352.84 \$1411.36

Check A 680

Willamette Tug and Barge Company

Portland, Oregon, May 10, 1944.

Voucher in Favor of C. T. Smith & Son \$1411.36

Entered IR-42.

(Testimony of Esson H. Smith.)

RESPONDENT'S EXHIBIT No. 13

Willamette Tug and Barge Company  
Dredging-Towing and Barging

Portland, Oregon, May 10, 1944.

Pay to the Order of C. T. Smith & Son \$1411.36  
(1411.36) Dollars.

To East Side Branch The First National Bank of  
Portland, 612 Southeast Morrison Street, near  
Grand Avenue. 24-69 Portland, Oregon 24-69.

Willamette Tug and Barge Company  
Special Fund

/s/ ARTHUR A. RIEDEL,  
President.

[Stamped]: Pay to the Order of Bank of Ste-  
venson, for Deposit Only, C. T. Smith & Son.

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Mr. Recken: And I also offer in evidence Ex-  
hibit No. 14, pre-trial exhibit.

Mr. White: No objection.

The Court: Admitted by stipulation.

(The document referred to, so offered and  
received, having been previously marked for  
identification on pre-trial conference, was there-  
upon marked received as Respondent's Ex-  
hibit 14.) [228]

(Testimony of Esson H. Smith.)

## RESPONDENT'S EXHIBIT No. 14

C. T. Smith & Son  
Towing, Barging, Pile Driving  
Stevenson, Washington  
June 22, 1944

Willamette Tug & Barge Co.  
Ft. of N. Portsmouth  
Portland, Oregon

Balance due from April \$ 117.50

May	2	\$ 117.50
	3	10.00
	4	37.00
	5	109.00
	6	40.00
	7	30.00
	8	10.00
	9	70.00
	10	74.00
	11	170.00
	12	58.00
	13	87.50
	14	50.00
	15	97.00
	16	147.50
	17	192.50
	19	156.25
	20	92.50
	22	137.50
	23	178.75

(Testimony of Esson H. Smith.)

	24	\$ 76.00	
	25	137.50	
	26	82.50	
	29	213.50	
	30	186.50	
	31	240.25	
June	2	96.25	
	3	144.40	
		<hr/>	
		\$3041.90	
		.80	
		<hr/>	
		\$2433.5200	2433.52
			<hr/>
	Total Due		\$2654.47

Mr. Recken: That is all.

Mr. White: No questions.

(Witness excused.)

Mr. White: If the Court please, at this time the owners of the Charles T. and the Willamette Tug and Barge Company have entered into a stipulation, through their proctors, "That the towage movements performed by the tug 'Charles T.' during the period from April 5, 1944, to and including June 2, 1944, whenever invoiced to customers of Willamette Tug and Barge Company, were invoiced in the name of Willamette Tug and Barge Company and had no reference to C. T. Smith and Son." That

is Pre-trial Exhibit No. 11, and I would like to offer that in evidence.

Mr. Recken: We stipulated on that, your Honor, so it may be received.

The Court: Received.

(The stipulation referred to, so offered and received, having been previously marked for identification on pre-trial conference as C. T. Smith and Son's Exhibit 11, was thereupon marked received as C. T. Smith and Son's Exhibit 11.)

DEFENDANTS' EXHIBIT No. 11

In the District Court of the United States  
for the District of Oregon

No. Civil 2489

OLE ERICKSEN and PACIFIC BUILDING  
MATERIALS COMPANY, a corporation,  
Libelants,

vs.

DIESEL TUG "CHARLES T," C. T. SMITH  
and ESSON SMITH, co-partners doing business as C. T. SMITH AND SON, Claimants  
of the Tug "CHARLES T," WILLAMETTE  
TUG AND BARGE COMPANY, a corporation,

Respondent,

STEAMSHIP "KARL LIEBKNECHT."

## STIPULATION

It Is Stipulated by and between the respective proctors for C. T. Smith and Son and Willamette Tug and Barge Company, that the towage movements performed by the tug "Charles T" during the period from April 5, 1944, to and including June 2, 1944, whenever invoiced to customers of Willamette Tug and Barge Company, were invoiced in the name of Willamette Tug and Barge Company and had no reference to C. T. Smith and Son.

/s/ SAMUEL H. BEAR,

Of Proctors for C. T. Smith  
and Son.

/s/ L. A. RECKEN,

Of Proctors for Willamette  
Tug and Barge Company.

[Endorsed]: Filed June 22, 1945.

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Mr. White: That concludes our case, with the exception that I would like to make reference in the record to two reports of the Interstate Commerce Commission, Volume 250 at page 812. At page 812, under Docket No. W-425, is the operating authority of C. T. Smith and Son, contract carrier application. On page 818 [229] of the same volume, under Docket No. W-643, is the operating authority of the Willamette Tug and Barge Company, common carrier application.

That concludes our case.

Mr. Recken: I would like to call Captain Campbell. He will be a short witness. [230]



ARTHUR A. RIEDEL,

was thereupon recalled as a witness in behalf of Willamette Tug and Barge Company, Respondent, and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Recken:

Q. Now, Mr. Riedel, you are the General Manager of the Willamette Tug and Barge Company?

A. Yes, sir.

Q. How many tugs do you have that you own?

A. We own five, and then we give out a lot of towing to other boats.

Q. And when did you first meet Mr. Smith, the owner——

A. Well, I don't remember just exactly, but I had seen him at some meetings here about a year or so ago.

Q. Well, how did it come about that he did this work for you?

A. Well, here is the way I remember it, that he called me up and heard that I had more towing than I could do, and so I told him yes, and he said he would like to take some of it on, and so he wrote me a letter telling me that he would do it for 90 per cent., and I told him we had to wait so long for our money and so much trouble in the billing that I wouldn't go for ninety but for 80 per cent., give him twenty and me eighty (sic), and he take the tows, just like anybody else, when there are any

(Testimony of Arthur A. Riedel.)

to take. He asked me if I thought that he could make six or seven hundred dollars. [235] I told him that we had a lot of towing and that if he tied up where it was handy—of course, I always get a boat—they want them at the ships, they call and want them right now, and if he was handy, why, he could do pretty well.

Q. How did it happen that he tied up at the——

A. Well, there was a few times that he tied up some place else, but I told him if he tied up there where it was handy he could get more tows, because when a tow comes in we give it to the one that is ready right now, or the next one that is handy. For instance, St. Helens, or Kensley (?), Johnny Redding, and fellows like that, they do the same thing, and when they have a tow and we have to do the billing they kick back with 10 per cent. or 20 per cent.

Q. Mr. Riedel, was there at any time anything said about charter between you and Smith relative to this?

A. No, in our conversation Smith never said a word about charter at all. I asked him about insurance and things which I ask everyone that does towing for me, and he said okeh, and I said that was good enough for me.

Q. Did he ever at any time inform you where his rights in towing were?

A. No, he never did. I have seen him up at different meetings and I supposed that he had them. I didn't check into it. I supposed that he had been

(Testimony of Arthur A. Riedel.)

an old-timer on the river and he could take care of that. [236]

Q. Now, did you give orders to Captain Bates?

A. Well, here is the only thing, an order would come in, if our boats wasn't there and his happened to be there, why, I would take and tell the Captain he had a barge to go so and so and it was up to him if he wanted to take it; if he didn't want to take it we would get the next handiest man, because we had to be there as soon as possible.

Q. Did your organization do any work on the Tug Charles T.?

A. No, sir, none whatever.

Q. Did you pay the employees?

A. No, sir. The only time—there was a time or two when the boys would beat it up to Stevenson to get their groceries, and there was times when they were a little short of money and they made a person-to-person loan from the bookkeeper; the bookkeeper give them a receipt and give it to them out of petty cash; and then there was times, when they would get a check, they would come in and pay it. They always paid their bills.

Q. Did you ever furnish any oil or lube?

A. No, sir, we had nothing to do with that. I didn't even know what dock they got their oil at, never noticed or paid any attention.

Q. Now, the statement of Mr. Smith to the effect that you wanted the boat kept at your moorage?

A. I didn't care if it was kept there. If it was kept there they made it a little handier for me,

(Testimony of Arthur A. Riedel.)

and I have got nine hundred foot of space there and one more boat wouldn't have made any difference. [237]

Q. In your conversation with Mr. Smith when this towage arrangement was made was there anything said by you to Mr. Smith as to whether he could do other towing for other people?

A. No, sir, it didn't make a bit of difference to us. If he wasn't there we called Johnny Redding, Johnny White, Kensley, St. Helens, Shaver sometimes, even had Smith at Rainier,—just called on the one that was handiest to get the job done as soon as possible.

Q. Well, the question I asked you, did you have any conversation with Mr. Esson Smith to the effect that even though he was tied at your dock he could take other tows?

A. I told him if there was any tows came up it was jake with me, all I wanted to do was to get my work done, if he wasn't there I would get somebody else, because everyone on the river there works for us that is handy.

Q. And how many different ones tow for you?

A. Well, there's about six or seven or eight, and 'most all but and kicks back at 10 or 20 per cent., because we have to do the billing and sometimes we have to wait three or four months for our money and sometimes have to borrow money to pay our bills.

Q. The question was asked you yesterday on the stand as to who towed the barge to Rainier after the collision and you said Smith.

(Testimony of Arthur A. Riedel.)

A. Yes, that is Smith of Rainier. That is Wilbur Smith.

Q. It wasn't this Smith?

A. No, it was Wilbur Smith. I think Mr. Bates tied up to the jetty and Wilbur Smith came along a couple of days later and towed it down to the shipyard. [238]

Mr. Recken: You may cross examine.

### Cross-Examination

By Mr. White:

Q. For what customer or customers mostly did the Charles T. do work?

A. Well, mostly for the War Department, the Treasury Department, and the Navy, and Moore-McCormick.

Q. And, generally speaking, where did the Tug Charles T. go for you?

A. Well, it was in Portland harbor most of the time, and once in a while went to Longview, and I think on two or three or four occasions probably went to Beaver.

Q. Who did the billing to the customer for these movements?

A. Well, they—he turned in—I got Captain Bates our log, as I would like to see it on our forms, and he said, "Well, I want to copy it on our own logs, copy for Mr. Smith," and I said, "That's fine" and we would do the billing. We do the billing on all the boats that works for us.

(Testimony of Arthur A. Riedel.)

Q. You do the billing to the customer?

A. Yes, sir.

Q. And is there any reference to either C. T. Smith and Son or the tug Charles T. on this billing to the customer?

A. Here's the way we do: We take and put the name of the boat on that we do the towing for, because we have to put the horsepower down, because oftentimes on an hourly basis, why, you have got to put the size of the boat in order to make the right charge.

Q. But there is no reference to who owns that boat on the billing, is there?

A. No, sir.

Q. And the billing, I presume, has the heading showing the Willamette Tug and Barge Company?

A. That is right.

Q. Now, what was the nature of the work that the Charles T. performed? Was it towing or pushing barges, or——

A. Just the same as—I just gave him the orders the same as anybody else, “There’s a tow if you want it.” “Okeh.” “If you have got time”, and so forth—or “Towing barges”—that’s about all.

Q. They did tow or push barges?

A. Well, we told him there was a tow and they could push or pull, whatever they wanted to. I never tell a man how to hook on. The captain is supposed to know that.

Q. Lets take a neutral ground: Did the Charles T. move barges for you during this period?



(Testimony of Arthur A. Riedel.)

A. Yes.

Q. Now, what were these barges loaded with?

A. Most of them were loaded with lend-lease equipment for Russia.

Q. Now, were some of these movements between Portland, Oregon and Longview, Washington?

A. Yes, sir.

Q. Now, your firm has I.C.C. operating authority to move commodities on non-self-propelled vessels, has it not?

A. Yes, sir, that is right.

Q. Now, does Mr. Smith have such operating authority, to your knowledge?

A. Well, I figured Mr. Smith, he knew what the work was. He came down there and heard we couldn't take care of all our towing, and I naturally supposed if he was towing that he had the authority, or if he didn't he wouldn't take them.

Q. Did you know also that Mr. Smith's towing authority only goes to Longview, Washington?

A. No, I didn't know that. I figure a man knows what he has got, and if he didn't have authority to go there that is up to him.

Q. Now, what authority publishes your rates, Mr. Riedel?

A. Well, you know more about that than I do,—that Columbia River Tariff Bureau.

Q. Are you a member of the Columbia River Tariff Bureau?

A. Yes, sir.

Q. Do they publish your tariffs?

(Testimony of Arthur A. Riedel.)

A. Yes, sir.

Q. Is Mr. Smith a member of that Bureau?

A. I think so. I have seen him up there a lot of times.

Q. Now, do you have copies of tariffs published by the Columbia River Tariff Bureau in your office?

A. Yes, sir.

Q. And you are a participating carrier?

A. That is right.

Q. And are the various carriers who participate in these tariffs listed on the front page of that tariff?

A. I think they are.

Q. Is Mr. Smith's name there?

A. Well, I am not positive, but I think it is there, but I wouldn't say for sure. I don't know as I looked over that tariff—

Q. Those tariffs are in your possession, however?

A. Oh, yes. We wouldn't be able to bill if we didn't have them.

Q. Now, Mr. Riedel, when you report your gross revenue—or, excuse me,—Do you report your gross towing revenue and your barge revenue to the Interstate Commerce Commission?

A. Well, I tell you, our office manager and tax man that we have takes care of that and I wouldn't know exactly how to handle that, but we handle it in the right way, I am quite sure of that.

Q. Well, you make an annual report to the Interstate Commerce Commission, do you not, Mr. Riedel?

(Testimony of Arthur A. Riedel.)

A. That is right.

Q. And don't you recall that you give your gross towing for the year in that report?

A. No, sir; I am so busy, going about twenty-four hours a day, and I leave that to the other fellow.

Q. You are General Manager of the company?

A. That is right.

Q. Well, assuming that your gross revenue was reported to the I.C.C., Mr. Riedel, would you put the towing revenue from this boat, the Charles T., which your company billed, and include that in the gross revenue of the Willamette Tug and Barge Company?

A. Well, I tell you, I am not an attorney or I am not a tax expert and I don't go in for that sort of thing, and you would have to come down and talk to our men at the office to get that, but I know that we do it the right way.

Q. Now, when you made the remark on direct examination that the captain "beat it up to Stevenson" did you mean that he took the boat up there?

A. Well, he went up to get groceries, and I am at the office about a fourth of the time and I am not sure whether he took the boat, but I know he went several times in the car.

Q. Yes. Now, you mentioned——

A. He also said in the office that he was captain of the boat and fully responsible and he was working for Mr. Smith, right in front of everybody there.

Mr. White: Well, I move that the remarks of

(Testimony of Arthur A. Riedel.)

the witness be stricken as not responsive to the question.

The Court: Yes, those remarks are stricken, because the authority of an agent can't be proved by hearsay on his own declaration.

Mr. White: Q. Now, Mr. Riedel, you [243] mentioned on direct examination that you employed Kensley, Shaver, and I believe there was one other man,——

A. St. Helens, Johnny Redding, Johnny White.

Q. Now, where are the headquarters of those firms?

A. Well, Johnny White is right straight across from us——

Q. Well, they are all in Portland harbor?

A. That is right.

Q. Do you know where the headquarters of C. T. Smith and Son are?

A. Stevenson, I understood.

Q. How far is Stevenson from the Portland harbor?

A. Oh, I wouldn't know. About forty-five or fifty miles. I don't know exactly.

Q. And any towing, generally speaking, is it up the river, above Vancouver?

A. No, sir.

Q. It is all below Vancouver or Portland?

A. Not all.

Q. Not all; but the great part of it?

A. Yes.

(Testimony of Arthur A. Riedel.)

The Court: I am sorry, I will have to suspend at this time. You may take the rest of the record. You don't need to stop.

Mr. White: Well, for the convenience of the Court, I will suspend right now, with one or two more questions.

Mr. Reeken: That is our last witness. We have no more witnesses. [244]

Mr. White: Is that agreeable, your Honor, to ask him one or two more questions?

The Court: Yes.

Mr. White: Q. Did you ever put a man on the Charles T., to your knowledge?

A. Yes, sir, there was one Sunday that a fellow by the name of George McDonald that worked for Smith, and our boat had broke down, and he said, "Art, I would sure like to make that tow. I can't get anybody." I said, "I haven't anything to do with the boat, but," I said, "being that you work for Smith, you can call him at The Dalles, and it is okeh with me," and he called Mr. Smith at Stevenson and Mr. Smith gave him permission to make that tow and he got paid for the tow just the same as though our man wasn't on it, and it was between him and the Captain who had run that boat before.

Mr. White: That is all I have.

(Witness excused.)

Mr. White: Your Honor, I have just one question I would like to ask Mr. Smith in rebuttal and that will conclude our case.

The Court: Well, you can ask him after I go. I

am going to stop right now. That is all right, just put in in the record and I will have it under consideration, because this is the only part of the case that I need any consideration on. So far as the accident is concerned, why, I am perfectly able to hold right now. I hold that Libelants are entitled to recover and that the responsibility is divided, [245] because it is perfectly obvious in this situation that there was a violation of the rules of navigation on the part of both, flagrant and serious violations. As a matter of fact, it isn't remarkable that these boats came together. It would be a remarkable thing if they had kept apart, under all the circumstances, the way navigation was carried on on the river at that time. If there was any way to penalize that sort of navigation the Court would go further, but I think the only equitable way to do is to divide the damages.

Mr. Recken: And there was one other question, if the Court please, as to the amount. Or is the Court going to take that under consideration?

The Court: Yes, the amount of damages I will take under consideration, likewise the question about the responsibility between Willamette and Smith.

Mr. Recken: Would the Court want us to make a written proof on it, your Honor?

The Court: Well, I will be back next week. I will hear you orally, if you would rather do it that way.

Mr. Recken: Well, I think probably that would be acceptable. What day next week?

The Court: I have no idea right now. I don't want to set my calendar for next week,——



Mr. Recken: Well, unfortunately, I have two cases in the Circuit Court next week. [246]

The Court: I won't deal with that question right now. If you will take it up with me next week I will give you time.

Mr. Recken: Yes.

The Court: Court is now in adjournment until tomorrow morning at ten o'clock.

Mr. White: Your Honor, may I——

The Court: Anything else that you take is within the record.

(Thereupon, at 11:05 o'clock A.M., June 22, 1945, the Court left the bench, and an adjournment of Court was had until 10:00 o'clock A.M., June 23, 1945, and thereafter on this 22d day of June, 1945, in the absence of the Court, further proceedings in the trial of the above-entitled cause were had as follows:)

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ARTHUR A. RIEDEL

was thereupon recalled as a witness in behalf of Willamette Tug and Barge Company, Respondent, and, having been previously duly sworn, was examined and testified further as follows:

Redirect Examination

By Mr. Recken:

Q. Have you ever leased any other ship before?

A. Yes, I have leased two boats before, and when I made the lease I made out a long lease agreement

(Testimony of Arthur A. Riedel.)

and had the boat inspected and had full insurance in every manner, way, shape and form, and any time I would enter into any kind of a lease or anything that would be the first thing that I would do.

Mr. Recken: All right, that is all, Mr. Riedel.

### Recross-Examination

Mr. White: I would like to ask him some questions.

Q. Mr. Riedel, you have leased or chartered more than two boats, have you not?

A. I only remember of leasing two.

Q. Well, you have told us about a number of other instances.

A. I told you about boats that just does towing for me, but I have only leased two boats in my whole entire time.

Q. That is, where you have had formal contract?

A. No, just leased the boats.

Q. Well, I know, but aren't you making a legal conclusion when you say what leasing a boat is?

A. When I lease a boat I lease the boat and take all the responsibility. When I give my towing out to somebody else, why, they are on their own.

Q. That is, as far as you are concerned they are on their own?

A. As far as the Willamette Tug and Barge Company.

Mr. White: That is all.

(Witness excused.)

[Endorsed]: Filed July 15, 1946. [248]

[Endorsed]: No. 11390. United States Circuit Court of Appeals for the Ninth Circuit. Willamette Tug and Barge Company, a corporation, Appellant, vs. Ole Ericksen and Pacific Building Materials Company, a corporation, C. T. Smith and Esson Smith, co-partners doing business as C. T. Smith and Son, Claimants of the Tug "Charles T", Steamship "Karl Liebknecht", Appellees. Apostles on Appeal. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed July 19, 1946.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

